81478-3

NO. 81478-3

SUPREME COURT OF THE STATE OF WASHINGTON

HAJRUDIN KUSTURA, GORDANA LUKIĆ, AND MAIDA MEMIŠEVIĆ,

Petitioners,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

DEPARTMENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

None of the three workers' compensation claimants in this case requested translation of any written correspondence from the Department of Labor & Industries until they hired their English-speaking attorney. Kustura timely appealed all the Department orders at issue. Lukić and Memišević failed to appeal the wage setting orders, although Lukić had hired an attorney, and Memišević used an interpreter every time she received a document from the Department. In their appeals, the Board of Industrial Insurance Appeals provided the three with an interpreter for at minimum their testimony. Although they complain that the Board should have provided more, they claim no prejudice that would justify a remand.

Due process allows requiring diligence by persons with limited English proficiency (LEP) receiving English notice. The Court of Appeals properly upheld the denial of extraordinary relief to Lukić and Memišević for their lack of diligence in failing to appeal the wage orders. The Court of Appeals published opinion is consistent with precedent and provides sufficient guidance on the issues raised. Review is not warranted.[1]

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[1] Similar arguments were raised and rejected by the Court of Appeals in four other cases involving other Bosnian-speaking claimants represented by the same attorney who represents the claimants here. *See Meštrovac v. Dep't of Labor & Indus.*, 142 Wn. App. 693, 176 P.3d 536 (2008); *Ferenćak v. Dep't of Labor & Indus.*, 142 Wn. App. 713, 175 P.3d 1109 (2008); *Mašić v. Dep't of Labor & Indus.*, No. 81759-6; *Resulović v. Dep't of Labor & Indus.*, No. 81758-8. Although review is being sought in all of these cases, they are not uniform and do not equally preserve or present the issues claimed.

II. COUNTERSTATEMENT OF THE ISSUES

1. Does law or equity require excusing Lukić and Memišević from failing to timely appeal the wage orders because they are LEP, when they failed to show diligent use of readily available resources?

2. Is the Court of Appeals opinion consistent with the established precedent that mere use of English to a LEP person does not violate due process or equal protection?

3. Is the Department *ex parte* claim administration a legal proceeding covered by chapter 2.43 RCW, when it is neither a court proceeding nor a hearing?

4. Is there any basis in law to require the Board to reimburse any interpreter expenses the claimants allegedly incurred, when chapter 2.43 RCW allocated interpreter cost to them?

5. Does precedent support the holding that employer taxes for government benefit programs are not wages workers receive as part of the contract of hire?

6. Does Kustura show any basis for review in challenging the finding supported by evidence that his employer paid $110 monthly premium for his healthcare at the time of injury?

III. COUNTERSTATEMENT OF THE FACTS

A. Department Claim Administration

At various times, Kustura, Lukić, and Memišević applied for and received workers' compensation. *Kustura* Certified Appeal Board Record (BR) 295 (stipulated history); *Lukić* BR 258 (same); *Memišević* BR 646 (same); *Kustura* Finding of Fact (FF) 1; *Lukić* FF 1; *Memišević* FF 1.[2]

[2] *Kustura*, *Lukić*, and *Memišević* Findings of Fact refer to those made by the Board and adopted by the superior court in the respective cases. Copies of the Board

Kustura appealed to the Board a Department order that set his wages for time-loss benefits and other related orders, challenging the wage computation. *Kustura* BR 264-72, 400-04, 425-28, 449-51, 465-69, 478-81, 496-500, 508-12; *Kustura* FF 1. Lukić appealed orders that terminated her time-loss benefits and closed her claim. *Lukić* BR 151-57, 532-37; *Lukić* FF 1. Memišević appealed orders paying her time-loss benefits and a Department letter that denied her request for interpreter services for her attorney-client communications. *Memišević* BR 64-67, 582-85, 636-39, 657-61; *Memišević* FF 1. In their notices of appeal, the claimants requested interpreter services for preparation and work for their appeals.

B. Board Proceedings

For Kustura, the Board appointed, at its expense, an interpreter for his testimony, but not for other testimony or his private communications with his attorney. Kustura brought his own interpreter and was permitted to have him present, although the industrial appeals judge (IAJ) used the Board-arranged one for official translation. *Kustura* TR (9/18/02) 4-5.[3]

Kustura's economist testified that Kustura's employer paid $110 monthly premium for his healthcare at the time of his injury. Moss

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orders and superior court judgments in *Kustura*, *Lukić*, and *Memišević* are attached as Appendices A (*Kustura*), B (*Lukić*), and C (*Memišević*).

[3] This answer refers to the testimony or statements at the Board proceedings by "TR" or the witness's surname, followed by the date of the proceeding and the page number of the transcript where the testimony is found and refers to the Board exhibits as "BR Ex." The transcripts and the exhibits are in the Certified Appeal Board Record.

(9/18/02) 64-65. The Board upheld the Department valuation of $110 monthly healthcare premium in Kustura's wages. *Kustura* BR 13-21.[4]

The Board provided Lukić and Memišević with an interpreter, at its expense, for all the testimony and recorded statements throughout the hearings, but not for the perpetuation depositions in which they did not participate or for their confidential attorney-client communications.[5] They both stipulated they never appealed the Department orders that set their wages. *Lukić* BR 258-59 (stipulated history); *Memišević* BR 647 (same).

The Board awarded Lukić pension benefits. *Lukić* BR 1-17. In *Memišević*, it concluded that Memišević was not entitled to have the Department pay for an interpreter for her attorney-client communications during claim administration. *Memišević* BR 1-5. The Board declined to address the two claimants' challenges to the wage computations, because neither of them appealed the wage orders. *Lukić* BR 16; *Memišević* BR 5.

C. Court Proceedings

The superior court consolidated *Kustura*, *Lukić*, and *Memišević* and upheld the Board decisions. CP 32-41, 61-63, 89-98, 176-81. The

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[4] The Board slightly modified the IAJ's findings and conclusions and confirmed that the employer payment for dental care must be included in wages. *Kustura* BR 4, 20.

[5] The only perpetuation deposition in *Memišević* was that of her economist conducted by her attorney for Memišević and other claimants in other cases, before the scheduling conference, before the IAJ made any decision on interpreter provision. *Memišević* BR 618 (3/11/03 deposition notice), 587 (appeal granted effective 3/7/03), 663 (appeal granted effective 4/11/03).

Court of Appeals affirmed. *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 175 P.3d 1117 (2008). This petition followed.

IV. REASONS WHY THE COURT SHOULD DENY REVIEW

The claimants present a number of interpreter and wage computation issues juxtaposed with a variety of constitutional provisions, statutes, rules, and policies, many raised for the first time before this Court. They offer scant analysis or authority to support their petition.

The Court of Appeals properly followed precedent in upholding the wage computation in *Kustura* and the denial of extraordinary relief in *Lukić* and *Memišević*. The claimants' arguments on the interpreter issues and Kustura's wage arguments lack merit and present no basis for review.

However, if this Court decides that an issue meets the review criteria, the Court should identify and limit review to that issue.

A. Lukić And Memišević Were Not Entitled To Equitable Relief From Their Failure To Comply With The Statutory Appeal Deadline Because They Were Not Diligent In Pursuing Appeals

Without any analysis or factual support, Lukić and Memišević claim, "Because the Department knew the English-only orders could not be read by the petitioners, the orders were not actually communicated to them, as required by RCW 51.52.050 & .060." Petition at 13 n.12. The claimant's receipt, not subjective understanding, of a Department order constitutes "communication" to trigger the 60-day appeal period under

RCW 51.52.060. *Rodriguez v. Dep't of Labor & Indus.*, 85 Wn.2d 949, 951-53, 540 P.2d 1359 (1975) (illiterate Spanish-speaking worker received a claim closing order). Their passing claim without discussion of *Rodriguez* does not merit review. *See State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (court "will not review issues for which inadequate argument has been briefed or only passing treatment has been made"). *Rodriguez* has not been overruled or changed by the legislature and properly determines the date of communication of the order.

In claiming equitable relief from their failure to timely appeal the wage orders, Lukić and Memišević have never addressed the established precedent that requires diligence for such relief. *See Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 178, 937 P.2d 565 (1997) (relief properly denied when claimant "did not diligently pursue remedies available");[6] *Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 927, 185 P.2d 113 (1947) ("Equity aids the vigilant, not those who slumber on their rights."); *Harman v. Dep't of Labor & Indus.*, 111 Wn. App. 920, 927, 47 P.3d 169 (2002) (same); *Dep't of Labor & Indus. v. Fields Corp.*, 112 Wn. App. 450, 459, 45 P.3d 1121 (2002) (same). Their complete failure to address

[6] The *Kingery* dissent was in accord with the diligence requirement but believed diligence was shown there. *See Kingery*, 132 Wn.2d at 182 (Alexander, J., dissenting).

the governing precedent should also preclude review on this equity issue.[7]

Nor does Lukić or Memišević challenge the conclusion that they were not diligent in pursuing appeals. *See Kustura*, 142 Wn. App. at 673. Memišević admitted she always had an interpreter for important matters and used one "every time" she received a Department document. Memišević (10/24/03) 180, (12/11/03) 76, 118 ("It's not hard to find interpreters."). Lukić hired an attorney "maybe six months" after the Department temporarily stopped benefits in March or April 2000. Lukić (4/24/03) 52, (9/29/03) 25.[8] Neither testified these or other resources were not available to them when they received the wage orders. Equitable relief was properly denied. *See Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006) (equitable relief is "extraordinary" and "discretionary").

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[7] Requiring diligence by a LEP person for equitable relief accords with the law in other contexts that require diligence and further inquiry to such a person. *See* discussion *infra*, IV(B) (due process); *Diaz v. Kelly*, 515 F.3d 149, 154 (2d Cir. 2008) ("diligence requirement of equitable tolling [for habeas corpus]" imposes a duty to "make all reasonable efforts to obtain assistance to mitigate his language deficiency"); *Mendoza v. Carey*, 449 F.3d 1065, 1069-70 (9th Cir. 2006) (courts "have rejected a per se rule" that language limitations can justify equitable tolling). The courts have denied relief also when the claimant fails to show inability to understand the order and the Department misconduct. *See Kingery*, 132 Wn.2d at 174 (plurality); *Lynn v. Dep't of Labor & Indus.*, 130 Wn. App. 829, 839, 125 P.3d 202 (2005).

[8] Thus, Lukić's and Memišević's claim that the record does not show they were represented by counsel or had interpreters available when the Department sent them the wage setting orders is incorrect. Also, in claiming extraordinary relief, they had the burden to explain why they were unable to timely appeal. It must also be noted that, on March 5, 2001, Lukić's former attorney filed a protest from a different Department order. *Lukić* BR 174, *Lukić* TR (9/29/03) 25. In September 2001, her current attorney filed a protest from yet another order denying time-loss benefits for certain time period, and, in June 2002, requested certain treatment. *Lukić* BR 174-76 (stipulated history). Lukić did not explain why she did not appeal the March 15, 2001 wage setting order.

Lukić and Memišević argue that relief is required when the Department should have known the claimant's illiteracy and would not suffer prejudice. Petition at 11-12. This argument has no basis in the record or findings, and this Court should thus disregard their claim that the Department "had actual knowledge of their inability to read or speak English." Petition at 12.[9] Further, *Rodriguez* does not support Lukić or Memišević, because the "extremely illiterate" Spanish-speaking Rodriguez showed diligence; Lukić and Memišević did not.[10] This Court has confirmed that diligence is required. *See Kingery*, 132 Wn.2d at 178.

Lukić and Memišević argue, for the first time, that their failure to appeal should be excused because the Industrial Insurance Act requires uniform treatment. Petition at 19-20. This argument is too late. RAP 2.5(a). The Act provides uniform treatment with a uniform 60-day appeal period, and equity aids diligent claimants in extraordinary cases. Their

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[9] Memišević points out the testimony of a Department program manager about a letter by Dr. Hakala to the Department that described her physical conditions when she visited the doctor with a translator. Petition at 6; Kennedy (4/5/04) 8-9; *Memišević* BR Ex. 35. She also points out the program manager's testimony on the Department use of language services and a phone call from Memišević through an interpreter. Petition at 6; Kennedy (4/5/04) 15-17, 50-51. But she does not explain how any of the testimony proves the Department knowledge of her inability to communicate in *written* English.

[10] *See Rodriguez*, 85 Wn.2d at 949-50 (worker received the order when his interpreter was hospitalized and his mother in Texas was to undergo surgery; he left for Texas, notifying the Department by his doctor of his change of address, and within 60 days of his return, had the order translated and appealed it).

attempt to bypass the diligence requirement cannot be a basis for review.[11]

The Court of Appeals opinion accords with *Rodriguez* and *Kingery*. Lukić and Memišević present no basis for review.

B. Well-Established Precedent Supports The Court Of Appeals Conclusion That The Department Use Of English To The Claimants Did Not Violate Due Process Or Equal Protection

The claimants argue that the Department violated due process and equal protection by sending them English orders. Petition at 12-16. The established precedent rejects this argument. They fail to show otherwise.[12]

1. The Department orders satisfied due process

Due process requires notice reasonably calculated to inform interested parties of the pendency of the action and afford them an opportunity to present their objections. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

The claimants fail to address the well-established precedent that, in civil cases involving only economic interests as here, due process does not require government to provide notices or services to LEP persons in their

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[11] Lukić and Memišević claim that in *Ferenćak*, the Board found an appeal timely when filed within 60 days after an interpreter communicated a Department order to the claimant. Petition at 19. The timeliness in *Ferenćak* was based on the parties' stipulation. Lukić and Memišević fail to explain how such an agreement in an unrelated case with distinct factual circumstances has any relevance here.

[12] The due process and equal protection issues do not apply to claimant Kustura, who timely appealed his wage order and did not appeal any order denying him translated notices. *Kustura*, 142 Wn. App. at 674 n.23. Kustura does not challenge this holding.

primary languages.[13] None of the cases they cite holds otherwise.[14]

Due process requires "diligence and further inquiry" by a LEP person receiving an English notice. *Soberal-Perez*, 717 F.2d at 43; *Olivo*, 337 N.E.2d at 909; *Guerrero*, 512 P.2d at 836; *Nazarova*, 171 F.3d at 483. Each of the orders here contained the Department address, a claim manager's phone number, and the claimant's name, claim number, and injury date.[15] These orders were not the first ones the claimants received; they had received benefits with time-loss payment orders. *Lukić* BR 258-261 (stipulated history); *Memišević* BR 646-651 (same). These orders would alert a reasonable LEP claimant that a further inquiry is required.

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[13] *See Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2d Cir. 1983) (social security denial), *cert. denied*, 466 U.S. 929 (1984); *Guerrero v. Carleson*, 512 P.2d 833, 836-37 (Cal. 1973) (welfare), *cert. denied*, 414 U.S. 1137 (1974); *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973) (unemployment benefit); *Alfonso v. Bd. of Review*, 444 A.2d 1075, 1076-78 (N.J. 1982) (same); *Hernandez v. Dep't of Labor*, 416 N.E.2d 263, 266-67 (Ill. 1981) (same); *Commonwealth v. Olivo*, 337 N.E.2d 904, 909-10 (Mass. 1975) (condemnation); *Toure v. United States*, 24 F.3d 444, 446 (2d Cir. 1994) (administrative seizure); *Frontera v. Sindell*, 522 F.2d 1215, 1221 (6th Cir. 1975) (civil service exam); *see also Nazarova v. INS*, 171 F.3d 478, 483 (9th Cir. 1999) (deportation hearing notice).

[14] *See Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998) (Arizona constitutional amendment banned public employees' use of non-English languages); *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006) (a tax lien house sale after its notice sent by a certified mail was returned unclaimed). The Department does not prohibit use of any non-English language. Unlike the house owner who never received notice in *Jones*, Lukić and Memišević received the wage orders but failed to diligently pursue appeals.

[15] Except for the one order sent to Memišević that was timely appealed, all of the appealed Department orders in this case were sent to the claimants' current English-speaking attorney. *Lukić* BR 150 (9/19/02 order affirming 8/30/02 order upon Lukić's protest), 532 (3/11/03 claim closing order); *Memišević* BR 68 (1/27/03 order sent to Memišević), 586 (2/10/03 order sent to her attorney), 635 (2/24/03 order sent to her current counsel), 662 (3/27/03 letter sent to her current counsel). Lukić and Memišević did not offer into evidence the wage orders they failed to appeal. However, the records available to the Department show the wage order in *Lukić* was sent to her then attorney.

In fact, Lukić hired an attorney, and Memišević used an interpreter "every time" she received a Department order. Memišević (12/11/03) 76; Lukić (4/24/03) 52. Their due process claim does not merit review.

2. The Department orders satisfied equal protection

The standard of review under equal protection in a case that does not involve a suspect class or a fundamental right is a minimal "rational basis" scrutiny.[16] *Seattle Sch. Dist. No. 1 v. Dep't of Labor & Indus.*, 116 Wn.2d 352, 362, 804 P.2d 621 (1991) (citation omitted).

In claiming that the Department use of English created a national origin suspect class, the claimants fail to address the well-established precedent: "Language, by itself, does not identify members of a suspect class." *Soberal-Perez*, 717 F.2d at 41; *Olivo*, 337 N.E.2d at 911 (inability to read English is "not a suspect class"); *Valdez v. N.Y. City Hous. Auth.*, 783 F. Supp. 109, 122 (S.D.N.Y. 1991) (same); *Moua v. City of Chico*, 324 F. Supp.2d 1132, 1137-38 (E.D. Cal. 2004) ("no case has held" providing English services constitutes national origin discrimination

[16] The claimants do not assert this case involves a fundamental right. *See Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 739, 57 P.3d 611 (2002) (workers' benefits are "finite state resources," not a fundamental right). Without reference to the record, they assert the Department policy is to send orders only in English except for Spanish-speaking claimants. Petition at 13. The Department policy is to provide interpreters for specified oral and written communications for LEP claimants and authorize translation of written documents to and from unrepresented LEP claimants upon request. Management Update (App. D).

against LEP persons).[17] The courts have consistently upheld use of English to LEP persons under equal protection.[18]

The claimants assert preserving state funds is *not in itself* a sufficient justification.[19] Petition at 15-16. This is not the sole interest; the Department has a legitimate interest in using the common language used in this state to provide swift relief to injured workers.[20]

The claimants rely on a foreign accent employment discrimination case.[21] But there is a distinction between a foreign accent and LEP.

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[17] The claimants point out language in Executive Order 13,166, 65 Fed. Reg. 50,121, 2000 WL 34508183 (Aug. 11, 2000), that federally-assisted programs should be made meaningfully accessible to LEP persons to avoid Title VI-proscribed discrimination. Petition at 14. They fail to explain how this language contradicts, or can overrule, the established precedent that language alone does not identify a national origin. EO 13,166 is "intended only to improve the internal management of the executive branch" and "does not create any right or benefit, substantive or procedural, enforceable at law or equity". Exec. Order No. 13,166 § 5. Title VI prohibits only intentional discrimination, and there is no private right to enforce regulations made under Title VI. *Alexander v. Sandoval*, 532 U.S. 275, 280-91, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

[18] *See Carmona*, 475 F.2d at 739; *Soberal-Perez*, 717 F.2d at 42-43; *Olivo*, 337 N.E.2d at 911; *Guerrero*, 512 P.2d at 837-39; *Guadalupe Org. v. Tempe Elementary Sch. Dist.*, 587 F.2d 1022, 1026-29 (9th Cir. 1978); *Frontera*, 522 F.2d at 1218-20; *Moua*, 324 F. Supp. 2d at 1139 (police did not provide interpreter for crime victims).

[19] The claimants assert there is no proof of added cost to the Department for providing further interpreter services. Petition at 15 n.19. Under the rational basis test, "the court may assume the existence of any conceivable state of facts that could provide a rational basis for the classification." *Andersen v. King County*, 158 Wn.2d 1, 31, 138 P.3d 963 (2006); *Gossett v. Farmers Ins. Co.*, 133 Wn.2d 954, 979, 948 P.2d 1264 (1997) (rational basis "does not require production of evidence to sustain the classification"). It is rational to assume providing interpreter services to all LEP claimants for all claim-related communications the claimants here demand would create significant cost.

[20] *See Soberal-Perez*, 717 F.2d at 42 ("English is the national language of the United States."); *Frontera*, 522 F.2d at 1220 ("Our laws are printed in English and our legislatures conduct their business in English."); *Olivo*, 337 N.E.2d at 911 (same); 8 U.S.C. § 1423 (generally requiring English literacy for nationalization); RCW 28A.180.040(1) (transitional bilingual instruction to "achieve competency in English").

[21] *Xieng v. Peoples Nat'l Bank of Wash.*, 120 Wn.2d 512, 844 P.2d 389 (1993) (employer conceded discrimination violating RCW 49.60 based on foreign accent).

Napreljac v. John Q. Hammons Hotels, Inc., 461 F. Supp.2d 981, 1030 n.31 (S.D. Iowa 2006) (distinguishing termination for a foreign accent and inability to "understand and communicate in English"). A Bosnian accent may identify a Bosnian national; inability to speak English does not.

The claimants complain that the Department provides some services in Spanish. Petition at 15. Equal protection allows a step at a time approach to attacking a societal issue, as long as the practice is "rationally based and free from invidious discrimination." *Dandridge v. Williams*, 397 U.S. 471, 486, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970). Providing Spanish services does not show any invidious discrimination. It only reflects the recognition that English and Spanish are the primary languages used in this state. *Kustura*, 142 Wn. App. at 687.

The Court of Appeals opinion accords with established due process and equal protection law. The claimants fail to show any basis for review.

C. Chapter 2.43 RCW Does Not Apply To Department Claim Administration And Did Not Require The Board To Pay For Interpreter Services For The Non-Indigent Claimants Here

The Court of Appeals properly adopted the only reasonable interpretation to conclude that Washington interpreter statute, chapter 2.43 RCW, does not apply to Department claim administration or require the Board to pay for interpreter services. *Kustura*, 142 Wn. App. at 677-82.

Given the published opinion in this case, review is unnecessary.[22]

The statute requires appointment of an interpreter for a LEP person involved in a "legal proceeding." RCW 2.43.030(1). The statute defines a "legal proceeding" to mean a (1) court proceeding, (2) grand jury hearing, or (3) hearing before an inquiry judge or stated administrative body:

> "Legal proceeding" means a proceeding in any court in this state, grand jury hearing, or *hearing* before an inquiry judge, or *before an administrative* board, commission, *agency*, or licensing body *of the state* or any political subdivision thereof.

RCW 2.43.020(3) (emphasis added). The prepositional phrase "before an administrative . . . agency . . . of the state" modifies only the immediately preceding noun "hearing." *Kustura*, 142 Wn. App. at 680; *Berrocal v. Fernandez*, 155 Wn.2d 585, 593, 121 P.3d 82 (2005) (unless contrary intent appears, qualifying words "refer to the last antecedent").

The Department *ex parte* claim administration process is not a court proceeding, grand jury hearing, or hearing. The claimants do not argue otherwise. Thus, chapter 2.43 RCW does not apply to the process.

The claimants argue the claim administration is a legal proceeding solely by reading the phrase "before an administrative . . . agency . . . of the state" to modify "proceeding." Petition at 9-10. This interpretation

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[22] Whether the statute applies to Department claim administration is at issue only in *Memišević*, because only Memišević requested Department-level services and appealed the letter of denial. Kustura and Lukić have waived any claim for such services. *Kustura*, 142 Wn. App. at 679 n.43. Neither Kustura nor Lukić challenges this holding.

fails, above all because the modifying phrase cannot grammatically follow another antecedent, "grand jury hearing." *See Berrocal*, 155 Wn.2d at 593-94 (last antecedent rule requires the modifier to "follow any one of the phrases, standing alone, to produce a structurally seamless sentence").

The Board hearing is a "legal proceeding," but the Board was not required to pay for interpreter services in this case, because it did not initiate the proceedings. RCW 2.43.040; *Kustura*, 142 Wn. App. at 680-81. The statute allocates interpreter costs to "the governmental body initiating the legal proceeding," RCW 2.43.040(2), or to "the non-English-speaking person, unless such person is indigent," RCW 2.43.040(3).[23] The statute contemplates that some proceedings are initiated by individuals. Here, the claimants initiated the proceedings by filing appeals, triggering Board jurisdiction. RCW 51.52.060. They never claimed indigency. The statute thus allocated interpreter costs to them.

The claimants argue, for the first time, that the Department initiated a legal proceeding because it is required by RCW 51.04.020(6) to "investigate the cause of all serious injuries and report to the governor from time to time any violations or laxity in performance of protective statutes or regulations". Petition at 10-11. This argument is waived. RAP

[23] The due process law likewise distinguishes "government-initiated proceedings seeking to affect adversely a person's status" from "hearings arising from the person's affirmative application for a benefit". *Abdullah v. INS*, 184 F.3d 158, 165 (2d Cir. 1999) (no right to interpreter at INS interview for special agricultural worker status).

2.5(a). Further, it makes no sense. There is no evidence the Department investigated the causes of their injuries under RCW 51.04.020(6). Such investigation occurs only if and after a claimant fulfills his or her duty of reporting an industrial injury. RCW 51.28.010(1). The claimants' theory that the Department acts like police in other contexts (e.g., issuing WISHA[24] citations or investigating fraud) is irrelevant here.[25]

The claimants seek review of *what they claim* is a holding that "not being prejudiced by [interpreter] expense, [they] were not entitled to reimbursement." Petition at 7. But this is not the holding. The Court of Appeals held they were not entitled to *free* interpreter services, regardless of the merits of their appeal, and engaged in the prejudice analysis only to see whether a reversal and a new hearing was required, not whether they should be reimbursed. *Kustura*, 142 Wn. App. at 680-82.[26]

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[24] Washington Industrial Safety & Health Act, chapter 49.17 RCW.

[25] The claimants argue that differently treating hearing-impaired and LEP persons violates equal protection, citing RCW 2.42.120(4) (providing interpreter services to a hearing-impaired person interviewed by law enforcement in a criminal investigation) and *State v. Marintorres*, 93 Wn. App. 442, 969 P.2d 501 (1999) (convicted defendant may not be assessed interpreter cost under RCW 2.43.040(4)). Petition at 9 n.9. But the Department did not interview them in a criminal investigation. Further, *Marintorres* is a criminal case, where "the government clearly initiates the proceedings". *Kustura*, 142 Wn. App. at 684 n.54; *see also State v. Gonzales-Morales*, 138 Wn.2d 374, 379, 979 P.2d 826 (1999) (criminal defendant's constitutional right to an interpreter). In civil cases, it is not irrational to provide different interpreter services for the hearing-impaired versus LEP because sign language covers most hearing-impaired, while there are thousands of languages. *See* Raymond G. Gordon, Jr., *Ethnologue: Languages of the World* (15th ed. 2005) (6900 plus living languages in the world), *available at* http:www.ethnologue.com; *World Almanac & Book of Facts* 731-32 (2006).

[26] Although the Court of Appeals found no reversible error, it held the claimants' private communications with their attorney during the Board hearings are part

Nor is there any merit to the claimants' reliance on case law involving waiver of an arbitration right that considers delay and expenses as "prejudice". Petition at 8-9; *Steele v. Lundgren*, 85 Wn. App. 845, 858, 935 P.2d 671 (1997) (party may waive right to arbitration by first conducting lengthy and aggressive litigation). The prejudice that may support a finding of a waiver of arbitration right is different from the prejudice in the outcome required for *a reversal*. "Absent a showing of prejudice to the outcome of the trial, an error does not constitute grounds for reversal." *Rice v. Janovich*, 109 Wn.2d 48, 63, 742 P.2d 1230 (1987).

The claimants offer no authority that persons incurring self-help, extra-statutory interpreter expenses are entitled to *reimbursement*.[27] If there was unlawful denial of interpreter services, the remedy is remand for a new hearing, necessary only when denial was prejudicial. *See, e.g., Guitierrez-Chavez v. INS*, 298 F.3d 824, 830 (9th Cir. 2002) (requiring prejudice to the outcome for remand for inadequate interpreter services).[28]

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of the "legal proceeding" under chapter 2.43 RCW. *Kustura*, 142 Wn. App. at 681. If this Court accepts review, the Department requests the Court to also review this holding.

[27] Costs may be awarded to a worker only if he or she prevails on the merits in court. RCW 51.52.130 (fourth sentence).

[28] The claimants argue, for the first time, that GR 33 requires free interpreter services and that the rule applies to the Board under WAC 263-12-125 (adopting "the statutes and rules regarding procedures in civil cases in the superior courts of this state"). Petition at 8 n.8. Their argument is waived. RAP 2.5(a). Further, GR 33 requires accommodations (with certain exceptions such as undue burden) to a "person with a disability" covered by the Americans with Disabilities Act, chapter 49.60 RCW, or other similar local, state, or federal laws. GR 33(4). The claimants provide no analysis to show that their limited English proficiency is a "disability" covered by any of such laws.

D. The Court Of Appeals Properly Followed Precedent That Employer Taxes For Government Benefit Programs Are Not "Wages" Workers Receive As Part Of The Contract Of Hire

The Court of Appeals followed *Erakovic* that holds government-mandated employer payments for general fund benefits such as Social Security, Medicare, or Industrial Insurance are not "wages" under RCW 51.08.178.[29] *Kustura*, 142 Wn. App. at 690-91; *Erakovic v. Dep't of Labor & Indus.*, 132 Wn. App. 762, 769-75, 134 P.3d 234 (2006).[30] Similarly, government-mandated payments for unemployment compensation are not wages. *Kustura*, 142 Wn. App. at 689-91; *Ferencak*, 142 Wn. App. at 725-27; *Mestrovac*, 142 Wn. App. at 712.[31]

Kustura claims *Erakovic* was wrongfully decided and conflicts with *Department of Labor & Industries v. Granger*, 159 Wn.2d 752, 153 P.3d 839 (2007). Petition at 17-19. There is no conflict.

"*Granger* did not address whether government-mandated employer payments to general funds are 'consideration of like nature' under RCW

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[29] Time-loss benefit rates are "determined by reference to a worker's wage at the time of injury." *Gallo v. Dep't of Labor & Indus.*, 155 Wn.2d 470, 481, 120 P.3d 564 (2005) (citations omitted). Wages include the "reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire". RCW 51.08.178(1); *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 806-22, 16 P.3d 583 (2001) (healthcare employer purchased under the terms of employment contract are wages); *Gallo*, 155 Wn.2d at 491-94 (retirement, life insurance, and certain other fringe benefits are not wages because they are not "consideration of like nature" and "not critical to the basic health and survival of the injured worker at the time of injury").

[30] The same attorney who represents Kustura represented worker Erakovic.

[31] The wage computation issues apply only to claimant Kustura. *Kustura*, 142 Wn. App. at 689. Neither Lukic nor Memisevic challenges this holding.

51.08.178(1)." *Ferenćak*, 142 Wn. App. at 726.[32] Government taxes for social funds are not "wages," in part because such payments, unlike those for healthcare, "are not earmarked for a specific employer's employees". *Erakovíć*, 132 Wn. App. at 770. "The plain language of RCW 51.08.178 requires that any 'consideration' must be received from the employer as part of the contract for hire." *Id.*; RCW 51.08.178(1) (defining wages as "received from the employer as part of the contract of hire").[33]

Kustura offers no argument not raised in *Erakovíć* and no reason to suggest it was wrong. Review is not warranted on this issue.

E. Kustura's Challenge To The Amount His Employer Paid For His Healthcare Lacks Merit And Presents No Basis For Review

Only the "monthly premium *actually* paid by an employer to secure" the healthcare need be included. *Cockle*, 142 Wn.2d at 820-21; *Granger*, 159 Wn.2d at 757-67 (upholding the inclusion of employer payment for healthcare). The Court of Appeals upheld the finding that Kustura's former employer paid $110 monthly premium to secure his healthcare. *Kustura* FF 7; *Kustura*, 142 Wn. App. at 691-92. This finding

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[32] *Granger* only addressed whether employer payments for an employee into a healthcare trust fund were received at the time of injury when the employee was not yet eligible for the healthcare. *Granger*, 159 Wn.2d at 759; *Ferenćak*, 142 Wn. App. at 726. *Granger* did not need to ask whether employer payments for healthcare are consideration of like nature, which *Cockle* had already answered yes. *Ferenćak*, 142 Wn. App. at 726.

[33] Also, these taxes were not consideration "of like nature" because they were not critical to workers' basic health and survival such that workers had to replace them during their disability. *See Erakovíć*, 132 Wn. App. at 770-75 (following *Cockle* and *Gallo* critical survival test).

is supported by his economist's testimony. Moss (9/18/02) 64-65. Kustura's contrary assertion is unsupported by the record and inconsistent with the standard of review and presents no basis for review. *See Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (substantial evidence standard of review for factual findings).[34]

V. CONCLUSION

For the reasons stated above, the Department requests that the Court deny the petition for review in this case.

RESPECTFULLY SUBMITTED this 20th day of August, 2008.

ROBERT M. MCKENNA
Attorney General

Masako Kanazawa
MASAKO KANAZAWA
WSBA 32703
Assistant Attorney General
Attorneys for Respondent

[34] Kustura also refers to the testimony that the "premiums made by the trust fund" were $167.49 for medical and $37.31 for dental care. Fisher (12/29/03) at 6; Petition at 4. But he ignores Fisher's further testimony that the employer did not pay the full cost of the premiums. Fisher (12/29/03) at 7.

Appendix A

Board order and superior court judgment (*Kustura*)

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: HAJRUDIN S. KUSTURA	DOCKET NOS. 01 18920, 02 10549, 02 10644, 02 10649, 02 10845, 02 11347 & 02 12749
CLAIM NO. P-890033	DECISION AND ORDER

APPEARANCES:

Claimant, Hajrudin S. Kustura, by
Ann Pearl Owen, P.S., per
Ann P. Owen

Employer, Dependable Building Maintenance of Washington, by
Sedgwick Claims Management Services, Inc., per
Patrick L. Nielsen

Department of Labor and Industries, by
The Office of the Attorney General, per
Charlotte E. Clark-Mahoney, Assistant

Docket No. 02 10549 is an appeal filed by the claimant on January 10, 2002, from a Department order dated December 24, 2001, in which the Department affirmed its orders dated November 5, 2001, November 19, 2001 and December 3, 2001. In its order dated November 5, 2001, the Department provided: time loss compensation paid from December 27, 2000 through October 30, 2001; including employer's contribution for health care benefits; and a deduction taken for Office of Financial Recovery lien. In its order dated November 19, 2001, the Department provided: the claimant will receive benefits every 14 days if certified by the attending doctor; time loss compensation paid from November 1, 2001 through November 14, 2001; deduction taken for Office of Financial Recovery lien. In its December 3, 2001 order, the Department provided: time loss compensation paid from November 15, 2001 through November 28, 2001; deduction taken for Office of Financial Recovery lien. The Department order is **REVERSED AND REMANDED.**

Docket No. 01 18920 is an appeal filed by the claimant on November 29, 2001, from the Department's order dated November 14, 2001, in which the Department affirmed its orders dated October 25, 2001, October 26, 2001, October 29, 2001 and November 5, 2001. In its order dated October 25, 2001, the Department provided: time loss compensation rate will be $1,123.65 per month, if the employer continues to provide health care benefits; rate will be $1,203.91 per month, if the employer does not continue to provide health care benefits; earnings based on $8.75 per hour; 8 hours per day, 5 days per week; health insurance of $110; wages of $1,650 per month, married

with no dependents. In its order dated October 26, 2001, the Department provided: a partial payment of time loss compensation made to adjust a previously paid period from October 31, 2000 through November 13, 2000; affected time period is November 1, 2000 through November 13, 2000; includes the employer's contribution for health care benefits. In its order dated October 29, 2001, the Department provided: a partial payment of time loss compensation made to adjust a previously paid period from November 14, 2000 through December 26, 2000; including the employer's contribution for health care benefits. In its order dated November 5, 2001, the Department provided: time loss compensation paid from December 27, 2000 through October 30, 2001; including employer's contribution for health care benefits; and a deduction taken for Office of Financial Recovery lien. The Department order is **REVERSED AND REMANDED.**

Docket No. 02 10644 is an appeal filed by the claimant on January 10, 2002, from a Department order dated December 28, 2001. In its order of December 28, 2001, the Department affirmed its order dated December 17, 2001, in which the Department provided: time loss compensation paid from November 29, 2001 through December 12, 2001. The Department order is **REVERSED AND REMANDED.**

Docket No. 02 10649 is an appeal filed by the claimant on January 14, 2002, from a Department order dated January 7, 2002. In its January 7, 2002 order, the Department affirmed its order dated December 31, 2001, in which the Department provided: time loss compensation paid from December 13, 2001 through December 26, 2001; and a deduction taken for Office of Financial Recovery Lien. The Department order is **REVERSED AND REMANDED.**

Docket No. 02 10845 is an appeal filed by the claimant January 18, 2002, from a Department order dated January 14, 2001 [*sic*], in which the Department provided: time loss compensation paid from December 27, 2001 through January 9, 2002; deduction taken for Office of Financial Recovery lien. The Department order is **REVERSED AND REMANDED.**

Docket No. 02 11347 is an appeal filed by the claimant on February 5, 2002, from a Department order dated January 28, 2002. In its January 28, 2002 order the Department provided: time loss compensation paid from January 10, 2002 through January 23, 2002. The Department order is **REVERSED AND REMANDED.**

Docket No. 02 12749 is an appeal filed by the claimant on March 14, 2002 from a Department order dated February 7, 2002, and a Department letter dated February 7, 2002. In its February 7, 2002 order the Department affirmed its order dated January 14, 2002, in which the Department provided: time loss compensation paid from December 27, 2001 through January 9,

2002. In its letter dated February 7, 2002, the Department referenced receipt of a letter from the employer regarding the amount of Mr. Kustura's wages and the amount of the employer's monthly contribution to healthcare benefits, and indicated that future payment orders would be issued on an interlocutory basis until the issue of wages has been decided upon by the Board of Industrial Insurance Appeals. In this letter the Department also stated that issues regarding the lien deductions by the Office of Financial Recovery should be addressed with that office. The Department order is **REVERSED AND REMANDED.**

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on February 27, 2004, in which the industrial appeals judge reversed and remanded the orders of the Department dated November 14, 2001 December 24, 2001, December 28, 2001, January 7, 2002, January 14, 2002, January 28, 2002 and February 7, 2002.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

The issue presented by this appeal and the evidence presented by the parties are adequately set forth in the Proposed Decision and Order.

This matter is before the Board for a second time. On June 18, 2003, the Board issued an Order Vacating Proposed Decision and Order and Remanding the Appeal for Further Proceedings. We remanded this matter to the hearing process for the sole purpose of obtaining evidence establishing the employer's cost of healthcare coverage. In his motion to reopen his case to present such evidence, which our industrial appeals judge erroneously denied, Mr. Kustura identified Mr. McInnes, a senior account executive for Northwest Administrators, as the person in the best position to address this issue and provide such testimony. For whatever reason, the claimant did not present Mr. McInnes' testimony, but rather presented the deposition testimony of Garth Fisher, an account executive with Northwest Administrators.

Our industrial appeals judge considered Mr. Fisher's testimony about the employer's cost of providing health care coverage and issued a second Proposed Decision and Order on February 27, 2004, which is substantially similar to, and with the same result as, the Proposed Decision and Order we previously vacated. Based on our review of Mr. Fisher's testimony, we determine that he did nothing to answer our question about the employer's actual cost for health care coverage for the claimant. Mr. Fisher testified that the employer paid $110 per month or $1.10 per hour per

employee for health care coverage. This is the same conflicting proof that was before us in the first place. As a result, Mr. Kustura's case to establish that the employer's cost was higher than $11[illegible] per month fails for lack of proof.

Although we agree with the disposition in the Proposed Decision and Order dated February 27, 2004, we granted review to correct errors in the findings of fact and conclusions of law. In Finding of Fact Nos. 8 and 10, and Conclusion of Law No. 4, our industrial appeals judge found and concluded that the employer's cost of providing health care coverage was $110 per month or $1.10 per hour per employee. As noted in our order remanding this matter to the hearing process, those figures are not equivalent and do not compute. Since the claimant failed to prove that the Department's determination of the amount of the employer's cost for health care coverage, $110 per month, was incorrect, Finding of Fact Nos. 8 and 10, and Conclusion of Law No. 4 should recite that amount. We also found an error in Conclusion of Law No. 6. Conclusion of Law No. 6 included the value of dental coverage in the list of benefits **not** included in the time loss compensation rate calculation per *Cockle v. Department of Labor & Indus.* 142 Wn.2d 801 (2001). This is an incorrect statement of the law.

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto, and a careful review of the entire record before us, we are persuaded that the Proposed Decision and Order is supported by the preponderance of the evidence and is correct as a matter of law.

FINDINGS OF FACT

1. On January 28, 2000, the Department received an application for benefits alleging that the claimant sustained a lumbosacral strain/sprain on October 12, 1999, in the course of his employment with Dependable Building Maintenance of Washington/Crystal Clean Maintenance.

   The claim for a lumbosacral sprain/strain was allowed under Claim No. P-890033 as an occupational disease with a date of manifestation of October 12, 1999.

   In Docket No. 02 10549, the claimant filed an appeal on January 10, 2002, from a Department order dated December 24, 2001, in which the Department affirmed its orders dated November 5, 2001, November 19, 2001 and December 3, 2001. In its order dated November 5, 2001, the Department provided: time loss compensation paid from December 27, 2000 through October 30, 2001; includes employer's contribution for health care benefits; deduction taken for Office of Financial Recovery lien. In its order dated November 19, 2001, the Department provided:

claimant will receive benefits every 14 days if certified by the attending doctor; time loss compensation paid from November 1, 2001 through November 14, 2001; deduction taken for Office of Financial Recovery lien. In its December 3, 2001 order, the Department provided: time loss compensation paid from November 15, 2001 through November 28, 2001; deduction taken for Office of Financial Recovery lien.

On March 11, 2002, the Board issued an order granting the appeal, assigning Docket No. 02 10549, and directing that further proceedings be held on the issues raised therein.

In Docket No. 01 18920, the claimant filed an appeal on November 27, 2001 from the Department's order dated November 14, 2001, in which the Department affirmed its orders dated October 25, 2001, October 26, 2001, October 29, 2001 and November 5, 2001.

In its order dated October 25, 2001, the Department provided: time loss compensation rate will be $1,123.65 per month if the employer continues to provide health care benefits; rate will be $1,203.91 per month if the employer does not continue to provide health care benefits; earnings based on $8.75 per hour; 8 hours per day, 5 days per week; health insurance of $110; wages of $1,650 per month, married with no dependents. In its order dated October 26, 2001, the Department provided: a partial payment of time loss compensation made to adjust a previously paid period from October 31, 2000 through November 13, 2000; affected time period is November 1, 2000 through November 13, 2000; includes employer's contribution for health care benefits. In its order dated October 29, 2001, the Department provided: a partial payment of time loss compensation made to adjust a previously paid period from November 14, 2000 through December 26, 2000; includes employer's contribution for health care benefits. In its order dated November 5, 2001, the Department provided: time loss compensation paid from December 27, 2000 through October 30, 2001; includes employer's contribution for health care benefits; deduction taken for Office of Financial Recovery lien.

On January 14, 2002, the Board issued an order granting the appeal, assigning Docket No. 01 18920, and directing that further proceedings be held on the issues raised therein.

In Docket No. 02 10644, the claimant filed an appeal on January 10, 2002, from a Department order dated December 28, 2001. In its December 28, 2001 order the Department affirmed its order dated December 17, 2001, in which the Department provided: time loss compensation paid from November 29, 2001 through December 12, 2001.

On March 11, 2002, the Board issued an order granting the appeal, assigning Docket No. 02 10644 and directing that further proceedings be held on the issues raised therein.

In Docket No. 02 10649, the claimant filed an appeal on January 14, 2002, from a Department order dated January 7, 2002. In its January 7, 2002 order the Department affirmed its order dated December 31, 2001, in which the Department provided: time loss compensation paid from December 13, 2001 through December 26, 2001; deduction taken for Office of Financial Recovery Lien.

On March 11, 2002, the Board issued an order granting the appeal, assigning Docket No. 02 10649 and directing that further proceedings be held on the issues raised therein.

In Docket No. 02 10845, the claimant filed an appeal on January 18, 2002, from a Department order dated January 14, 2001 [*sic*], in which the Department provided: time loss compensation paid from December 27, 2001 through January 9, 2002; deduction taken for Office of Financial Recovery lien.

On March 11, 2002, the Board issued an order granting the appeal, assigning Docket No. 02 10845, and directing that further proceedings be held on the issues raised therein.

In Docket No. 02 11347, the claimant filed an appeal on February 5, 2002, from a Department order dated January 28, 2002. In its January 28, 2002 order, the Department provided: time loss compensation paid from January 10, 2002 through January 23, 2002.

On March 11, 2002, the Board issued an order granting the appeal, assigning Docket No. 02 11347, and directing that further proceedings be held on the issues raised therein.

In Docket No. 02 12749, the claimant filed an appeal on March 14, 2002, from a Department order dated February 7, 2002. In its February 7, 2002 order, the Department affirmed its order dated January 14, 2002, in which the Department provided: time loss compensation paid from December 27, 2001 through January 9, 2002. In its February 7, 2002 letter, the Department referenced receipt of a letter from the employer regarding the amount of Mr. Kustura's wages and the amount of the employer's monthly contribution to healthcare benefits, indicated that future payment orders would be issued on an interlocutory basis until the issue of wages has been decided upon by the Board of Industrial Insurance Appeals. In its letter, the Department also stated that issues regarding the lien deductions by the Office of Financial Recovery should be addressed with that office.

On April 11, 2002, the Board issued an order granting the appeal, assigning Docket No. 02 12749, and directing that further proceedings be held on the issues raised therein.

2. Hajrudin Kustura is a Bosnian immigrant who does not understand or speak English. Mr. Kustura became an employee of Dependable Building Maintenance of Washington in March 1999.

3. As of October 12, 1999, Mr. Kustura earned $8.75 per hour, and he worked full-time, 8 hours per day, 5 days per week.

4. As of October 12, 1999, Mr. Kustura was married with one dependent daughter, Emira, born in November 1982. Mr. Kustura's wife and daughter, Emira, resided in Austria prior to October 12, 1999, and have continued to reside there. Mr. Kustura sent money to Austria to his wife and daughter, when possible, from the wages he received from Dependable Building Maintenance and from the time loss compensation payments he received after October 12, 1999.

5. As of October 12, 1999, Mr. Kustura was a member of Service Employees International Union Local 6.

6. As a member of Service Employees International Union Local 6, Mr. Kustura was eligible for medical, life insurance, accidental death and dismemberment insurance, and short-term disability insurance.

7. As of October 12, 1999, the premiums paid by the union trust fund through Northwest Administrators (administrator of union health, welfare and pension plans) for the aforementioned coverage amounted to $110 per month. As of October 12, 1999, the premiums paid by the union's trust fund for life insurance totaled 36 cents per month; for accidental death and dismemberment, 12 cents per month; for short-term disability, $14 per month.

8. As of October 12, 1999, Mr. Kustura's employer, Dependable Building Maintenance, paid $110 per month towards the union health and welfare plan for Mr. Kustura, and Mr. Kustura was therefore afforded medical coverage, life insurance, accidental death and dismemberment insurance, and short term disability insurance benefits through his union as of the date of his 1999 industrial injury.

9. As of October 12, 1999, Mr. Kustura was eligible for the insurance benefits described in Finding of Fact No. 6, but his eligibility for these benefits terminated effective June 1, 2000.

10. The cost to Mr. Kustura's employer, Dependable Building Maintenance, for Mr. Kustura's prescription drug coverage and medical insurance totaled $110 per month.

11. As of October 12, 1999, Mr. Kustura's employer paid the requisite premiums to the federal and state governments for unemployment compensation, worker's compensation, social security, and Medicare benefits.

12. As of October 12, 1999, Mr. Kustura's employer made financial contributions to a pension plan for Mr. Kustura, but Mr. Kustura did not qualify for that benefit as of October 12, 1999, because he had worked at Dependable Building Maintenance for less than one year.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of these appeals, but the Board does not have jurisdiction over constitutional issues.

2. As of October 12, 1999, the claimant was a full-time worker within the meaning of RCW 51.08.178(1), earning $8.75 per hour.

3. As of October 12, 1999, the claimant was married and his daughter, Emira, born November 1982, was his dependent within the meaning of RCW 51.08.050.

4. As of October 12, 1999, the employer's cost for the claimant's health care coverage amounted to $110 per month for each employee. Mr. Kustura was no longer eligible for employer paid health care benefits as of June 1, 2000.

5. The employer's cost for the claimant's health care coverage, as of October 12, 1999, should be included by the Department in calculating the claimant's "wages" for the purpose of computing his time loss compensation rate. *Cockle v. Department of Labor & Indus.* 142 Wn.2d 801 (2001).

6. The claimant is not entitled to inclusion of the value of the employer's contributions to his union health and welfare plan, or to the value of his life, disability, accidental death and dismemberment insurance benefits, or the inclusion of any pension benefit in his base wage rate for purposes of time-loss calculation as contemplated by *Cockle v. Department of Labor & Indus.* 142 Wn.2d 801 (2001).

7. The value of any unemployment compensation, worker's compensation benefits, social security or Medicare benefits, to which the claimant may be entitled should not be included in his base wage rate for purposes of time-loss compensation as contemplated by *Cockle v. Department of Labor & Indus.* 142 Wn.2d 801 (2001).

8. The orders of the Department of Labor and Industries dated December 24, 2001, November 14, 2001, December 28, 2001, January 7, 2002, January 14, 2002, and February 7, 2002, are incorrect and are reversed. This claim is remanded to the Department with directions to recalculate the claimant's wage loss rate based on married with one dependent, and with directions to also include in the wage loss calculations the employer's cost of $110 per month as of October 12, 1999, for the claimant's health care coverage. The Department is directed to take such other action as is consistent with the law and the facts herein.

It is so **ORDERED**.

Dated this 19th day of May, 2004.

BOARD OF INDUSTRIAL INSURANCE APPEALS

Thomas E. Egan

THOMAS E. EGAN Chairperson

Calhoun Dickinson

CALHOUN DICKINSON Member

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

HAJRUDIN S. KUSTURA, Plaintiff, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Defendant.	NO. 04-2-26427-8 SEA FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT **Clerk's Action Required**

JUDGMENT SUMMARY (RCW 4.64.030)

1. Judgment Creditor:	State of Washington Department of Labor and Industries
2. Judgment Debtor:	Hajrudin S. Kustura
3. Principal Amount of Judgment:	- 0 -
4. Interest to Date of Judgment:	- 0 -
5. Statutory Attorney Fees:	$200.00
6. Costs:	$0
7. Other Recovery Amounts:	$0

8. Principal Judgment Amount shall bear interest at 0% per annum.

9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum.

10. Attorney for Judgment Creditor:	Charlotte Ennis Clark-Mahoney Office of the Attorney General 900 fourth Avenue Seattle, WA 98164
11. Attorney for Judgment Debtor:	Ann Pearl Owen

ORIGINAL

ATTORNEY GENERAL OF WASHINGTON
LABOR & INDUSTRIES DIVISION
900 Fourth Avenue, Suite 2000
Seattle, WA 98164-1012
(206) 464-7740

Attorney at Law
2407 14th Avenue South
Seattle, WA 98144

This matter came on regularly before the Honorable William Downing, in open court on September 16, 2005. The Plaintiff, Hajrudin S. Kustura, was represented by counsel, Ann Pearl Owen; the Defendant, Department of Labor and Industries (Department), appeared by its counsel, Rob McKenna, Attorney General, per Charlotte Ennis Clark-Mahoney, Assistant. The Court reviewed the records and files herein, including the Certified Appeal Board Record, and briefs submitted by counsel, and heard argument of Counsel. Therefore, being fully informed, the Court makes the following:

I. FINDINGS OF FACT

1.1 Hearings were held at the Board of Industrial Insurance Appeals (Board) and testimony of other witnesses was perpetuated by deposition.

The Industrial Appeals Judge issued an initial Proposed Decision and Order on April 2, 2003 from which Plaintiff filed a timely Petition for Review. The Board granted review, vacated the Proposed Decision and Order and remanded the appeal for further proceedings on June 18, 2003.

Further evidence was taken and the Industrial Appeals Judge issued a Proposed Decision and Order from which Plaintiff filed a timely Petition for Review. The Board, considered Plaintiff's Petition for Review, granted review and issued its Decision and Order on May 19, 2004.. Plaintiff filed a motion to Vacate that was denied on September 28, 2004.

Plaintiff thereupon timely appealed the Board's order to this Court.

1.2 A preponderance of evidence supports the Board's Findings of Fact Nos. 1 through 12. The Court adopts as its Findings of Fact, and incorporates by this reference, the Board's Findings of Facts Nos. 1 through 12 of the May 19, 2004 Decision and Order.

Based upon the foregoing Findings of Fact, the Court now makes the following

II. CONCLUSIONS OF LAW

2.1 This Court has jurisdiction over the parties to, and the subject matter of, this appeal.

2.2 The Board's Conclusions of Law Nos. 1 through 8 are correct. The Court adopts as its Conclusions of Law, and incorporates by this reference, the Board's Conclusions of Law Nos. 1 through 8 of the May 19, 2004 Decision and Order.

2.3 The Board's Decision and Order of May 19, 2004 is correct and is affirmed.

Based on the foregoing Findings of Fact and Conclusions of Law the Court enters judgment as follows:

III. JUDGMENT

3.1 The May 19, 2004 Board of Industrial Insurance Appeals Decision and Order, should be and is hereby affirmed.

3.2 The Defendant is awarded, and the Plaintiff is ordered to pay, a statutory attorney fee of $200.00.

3.3 The Department is awarded interest from the date of entry of this judgment as provided by RCW 4.56.110.

DATED this 21 day of ~~October~~ Nov, 2005.

William L. Downing, J U D G E

Presented by:
ROB MCKENNA
Attorney General

CHARLOTTE ENNIS CLARK-MAHONEY
Assistant Attorney General
WSBA No. 13096

Copy received,
approved as to form and
notice of presentation waived:

ANN PEARL OWEN
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Attorney for Claimant

ATTORNEY GENERAL OF WASHINGTON
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(206) 464-7740

Appendix B

Board order and superior court judgment (*Lukić*)

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MAIDA MEMISEVIC	DOCKET NOS. 03 11518, 03 11721, 03 12415 & 03 13711
CLAIM NO. Y-275939	DECISION AND ORDER

APPEARANCES:

Claimant, Maida Memisevic, by
Law Offices of Ann Pearl Owen, P.S., per
Ann Pearl Owen

Employer, Dependable Building Maintenance of Washington, per
Ralph Davis, CEO

Department of Labor and Industries, by
The Office of the Attorney General, per
Heather K. Leibowitz, Assistant

In the matter assigned Docket No. 03 11518, the claimant, Maida Memisevic, filed an appeal with the Board of Industrial Insurance Appeals on February 6, 2003, from an order of the Department of Labor and Industries dated January 27, 2003. In this order, the Department paid time loss compensation for the period January 9, 2003 through January 22, 2003. The Department order is **AFFIRMED**.

In the matter assigned Docket No. 03 11721, the claimant, Maida Memisevic, filed an appeal with the Board of Industrial Insurance Appeals on February 12, 2003, from an order of the Department of Labor and Industries dated February 10, 2003. In this order, the Department paid time loss compensation for the period January 23, 2003 through February 5, 2003. The Department order is **AFFIRMED**.

In the matter assigned Docket No. 03 12415, the claimant, Maida Memisevic, filed an appeal with the Board of Industrial Insurance Appeals on February 28, 2003, from an order of the Department of Labor and Industries dated February 24, 2003. In this order, the Department paid time loss compensation for the period February 6, 2003 through February 19, 2003. The Department order is **AFFIRMED**.

In the matter assigned Docket No. 03 13711, the claimant, Maida Memisevic, filed an appeal with the Board of Industrial Insurance Appeals on April 2, 2003, from a letter of the Department of Labor and Industries dated March 27, 2003. The letter acknowledged that interpreter services were needed for the claimant and had been provided when required. The Department denied authorizing

interpreter services for communication between the claimant and her attorney. The Department letter is **AFFIRMED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on June 29, 2004, in which the industrial appeals judge affirmed the Department orders dated January 27, 2003, February 10, 2003, and February 24, 2003, as well as the determinative Department letter dated March 27, 2003.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

The issues presented by these appeals and the evidence presented by the parties are adequately set forth in the Proposed Decision and Order.

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto, and a careful review of the entire record before us, we are persuaded that the Proposed Decision and Order is supported by the preponderance of the evidence and is correct as a matter of law.

FINDINGS OF FACT

1. On November 7, 2001, the claimant, Maida Memisevic, filed an application for benefits with the Department of Labor and Industries, alleging that on November 1, 2001, she injured her back during the course of her employment with Dependable Building Maintenance of Washington. On December 11, 2001, the Department issued an order in which it allowed the claim.

   On December 24, 2001, the Department issued an interlocutory order in which it set a wage rate and paid time loss compensation for the period November 2, 2001 through December 21, 2001. On December 26, 2001, the Department issued an order in which it set the wage rate at $2,179.50 per month based upon $10.95 per hour, eight hours per day, five days per week, single with no dependents, and included monthly health insurance of $252.30 paid by the employer. Time loss compensation was paid at that rate for the period December 22, 2001 through February 14, 2002.

   On February 22, 2002, the Department issued an order in which it corrected and superseded the December 26, 2001 order wherein the Department set time loss compensation at $1,252.68 based upon gross wages of $2,179.50 computed at $10.95 per hour, eight hours per day, five days per week, and included health care insurance of $252.30. On March 12, 2002, the Department issued an order in which it adjusted

and paid time loss compensation back to November 2, 2001. On October 3, 2002, the Department issued an order in which it terminated time loss compensation as paid through September 29, 2002, as the claimant had returned to work.

On October 17, 2002, the Department issued an order in which it closed the claim with time loss compensation as paid through September 29, 2002, and no award for permanent partial disability. On November 5, 2002, Ms. Memisevic protested the closure of the claim. On November 19, 2002, the Department issued an order in which it reversed the October 17, 2002 order and kept the claim open for further benefits. On December 2, 2003, time loss compensation was paid for the period October 18, 2002 through November 27, 2002.

On January 27, 2003, the Department issued an order in which it paid time loss compensation for the period January 9, 2003 through January 22, 2003. On February 6, 2003, Ms. Memisevic filed a Notice of Appeal with the Board of Industrial Insurance Appeals to the January 27, 2003 order. On April 9, 2003, the Board issued an order in which it granted the appeal and assigned Docket No. 03 11518.

On February 10, 2003, the Department issued an order in which it paid time loss compensation for the period January 23, 2003 through February 5, 2003. On February 12, 2003, the claimant filed a Notice of Appeal with the Board. On March 7, 2003, the Board issued an order in which it granted the appeal and assigned Docket No. 03 11721.

On February 24, 2003, the Department issued an order in which it paid time loss compensation for the period February 6, 2003 through February 19, 2003. On February 28, 2003, Ms. Memisevic filed a Notice of Appeal with the Board. On April 3, 2003, the Board issued an order in which it granted the appeal and assigned Docket No. 03 12415.

On March 27, 2003, the Department issued a determinative letter wherein the Department denied payment for interpreter services for communication between the claimant and her attorney. On April 2, 2003, Ms. Memisevic filed a Notice of Appeal with the Board. On April 11, 2003, the Board issued an order in which it granted the appeal and assigned Docket No. 03 13711.

2. On November 1, 2001, Maida Memisevic sustained an injury to her back during the course of her employment with Dependable Building Maintenance of Washington while working as a janitor.

3. As of November 1, 2001, Ms. Memisevic's base wage was $10.95 per hour, eight hours per day, five days per week, and she worked on a full-time basis. She was single with no dependents.

4. From November 1, 2001 through July 31, 2002, Ms. Memisevic retained her health and welfare benefits through the union contract with the employer. The employer paid premiums of $252.30 per month for an additional 90 days and the union trust made payments thereafter, so as to provide continuous healthcare coverage through July 31, 2002. These benefits were critical to maintaining the claimant's basic health.

5. As of November 1, 2001, Ms. Memisevic was receiving pension benefits accruing at the rate of 13 cents per hour, life insurance at the rate of 36 cents per month, accidental death and disability insurance at the rate of 12 cents per month, and non-industrial related time loss at the rate of $16 per month. These benefits were not critical to protecting the claimant's basic health and survival.

6. As of November 1, 2001, Ms. Memisevic was not vested in her pension plan and had no entitlement to these benefits.

7. As of November 1, 2001, the employer was making regular payroll deductions from wages for all necessary state and federal contributions to social security, Medicare, Medicaid, unemployment compensation, and industrial insurance. In addition, the claimant could have received additional benefits, pursuant to contract, that included jury duty compensation, leave of absence, family leave, paid vacation leave, and uniforms. These benefits were not critical to the claimant's basic health or survival.

8. Ms. Memisevic did not file a protest or appeal at any time to the Department order dated February 22, 2002, setting her wage rate at the time of injury.

9. Prior to February 24, 2003, the date of the last Department order on appeal, the claimant did not file, pursuant to RCW 51.28.040, a request with the Department to adjust her time loss compensation on the basis of a change of circumstances.

10. Ms. Memisevic is not fluent in the English language. She immigrated from Bosnia and requires an interpreter for accurate communication in the English language.

11. Prior to filing her appeals with the Board through her attorney, Ms. Memisevic used the services of an interpreter regarding all communications with the Department to include written orders. Ms. Memisevic's financial status did not prevent her from obtaining these services.

12. During all legal proceedings before the Board, a Bosnian interpreter was provided to the claimant at the Board's expense and at no cost to the claimant.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of these appeals.

2. The Department order dated February 22, 2002, wherein the Department established the wage rate basis for Maida Memisevic's time loss compensation rate, became final and binding within the meaning of RCW 51.52.060 and *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994).

3. Ms. Memisevic is not entitled to have the Department pay the cost of an interpreter for communications between herself and her attorney regarding the processing of her claim within the guidelines of Department policy or as contemplated by WAC 263-12-090 and RCW 2.43.

4. The Department orders dated January 27, 2003, February 10, 2003, and February 24, 2003, as well as the determinative Department letter dated March 27, 2003, are correct and are affirmed.

It is so **ORDERED**.

Dated this 14th day of September, 2004.

BOARD OF INDUSTRIAL INSURANCE APPEALS

THOMAS E. EGAN Chairperson

CALHOUN DICKINSON Member

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

MAIDA MEMISEVIC Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	NO. 04-2-26426-0 SEA FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT **Clerk's Action Required**

This matter came on regularly before the Honorable William Downing, in open court on September 16, 2005. Appellant, Maida Memisevic, appeared with counsel, Ann Pearl Owen; the Defendant, Department of Labor and Industries (Department), appeared by counsel, Rob McKenna, Attorney General, per Charlotte Ennis Clark-Mahoney, Assistant. The Court reviewed the records and files herein, including the Certified Appeal Board Record and briefs submitted by counsel, and heard argument of Counsel. Therefore, being fully informed, the Court makes the following:

I. FINDINGS OF FACT

1.1 Hearings were held at the Board of Industrial Insurance Appeals (Board) and testimony of other witnesses was perpetuated by deposition.

The Industrial Appeals Judge issued an initial Proposed Decision and Order on June 29, 2004 from which Plaintiff filed a timely Petition for Review. The Board considered Plaintiff's Petition for Review, granted review, and issued its Decision and order on September 14, 2004.

Plaintiff thereupon timely appealed the Board's Decision and Order to this Court.

ORIGINAL

ATTORNEY GENERAL OF WASHINGTON
LABOR & INDUSTRIES DIVISION
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1.2 A preponderance of evidence supports the Board's Findings of Fact Nos. 2, and 4 through 12. The Court adopts as its Findings of Fact, and incorporates by this reference the Board's Findings of Facts Nos. 2, and 4 through 12 of the September 14, 2004 Decision and Order.

1.3 The Board Finding of Fact No. 1, the third full paragraph failed to include that the Department order of February 22, 2002 calculated her wage rate based on her status of married with no dependents. The is *changed* as follows:

"On February 22, 2002, the Department issued an order in which it corrected and superseded the December 26, 2001 order wherein the Department set time loss compensation at $1,252.68 based upon gross wages of $2,179.50 computed at $10.95 per hour, eight hours per day, five days per week, and included health care insurance of $252.30, *married with 0 dependents*. On March 12, 2002, the Department issued an order in which it adjusted and paid time loss compensation back to November 2, 2001. On October 3, 2002, the Department issued an order in which it terminated time loss compensation as paid through September 29, 2002, as the claimant had returned to work."

1.4 Plaintiff did not protest or appeal the February 22, 2002 Department order which established Plaintiff's wage rate, as of November 1, 2001, as $10.95 per hour, eight hours per day, five days per week, on a full-time basis, and that Plaintiff was *married* with no dependents.

Based upon the foregoing Findings of Fact, the Court now makes the following

II. CONCLUSIONS OF LAW

2.1 This Court has jurisdiction over the parties to, and the subject matter of, this appeal.

2.2 The Board's Conclusions of Law Nos. 1 through 4 are correct. The Court adopts as its Conclusions of Law, and incorporates by this reference, the Board's Conclusions of Law Nos. 1 through 4 of September 14, 2004 Decision and Order.

2.3 The Board's Decision and Order of September 14, 2004, except as modified in the Court's Findings of Fact 1.3 and 1.4, is correct and is affirmed.

Based on the foregoing Findings of Fact and Conclusions of Law the Court enters judgment as follows:

III. JUDGMENT

3.1 It is hereby ORDERED, ADJUDGED AND DECREED that the September 14, 2004 Board of Industrial Insurance Appeals Decision and Order, that affirmed the Department's orders of January 27, February 10 and February 24, 2003 and the letter of March 27, 2003, should be and is hereby affirmed as modified.

ATTORNEY GENERAL OF WASHINGTON
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DATED this 21 day of November, 2005.

William L. Downing, J U D G E

Presented by:
ROB MCKENNA
Attorney General

CHARLOTTE ENNIS CLARK-MAHONEY
Assistant Attorney General
WSBA No. 13096

Copy received,
approved as to form and
notice of presentation waived:

ANN PEARL OWEN
WSBA No. 9033
Attorney for Claimant

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Appendix C

Board order and superior court judgment (*Memišević*)

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: GORDANA LUKIC) DOCKET NOS. 02 20031 & 03 12722
)
CLAIM NO. P-041251) DECISION AND ORDER

APPEARANCES:

Claimant, Gordana Lukic, by
Ann Pearl Owen, P.S., per
Ann Pearl Owen

Employer, Urban Four Seasons Hotel,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Charlotte E. Clark-Mahoney, Assistant

Interested Party, Alliance Reporting, Inc., by
Smith, McKenzie, Rothwell & Barlow, P.S., per
Mark Smith

This matter involves appeals from two different orders. The first, Docket No. 02 20031, is an appeal filed with the Board of Industrial Insurance Appeals by the claimant, Gordana Lukic, on September 26, 2002, from an order of the Department of Labor and Industries dated September 19, 2002. In this order, the Department affirmed its order of August 30, 2002, wherein time loss compensation benefits were denied for the period of January 26, 2002 through August 29, 2002. The Department order is **REVERSED AND REMANDED.**

The second, Docket No. 03 12722, is an appeal filed by the claimant, Gordana Lukic, on March 17, 2003, from an order of the Department of Labor and Industries dated March 11, 2003. In this order, the Department ended time loss compensation as paid through January 25, 2002, and closed the claim with no award for permanent partial disability. The Department order is **REVERSED AND REMANDED.**

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on March 2, 2004, in which our industrial appeals judge reversed and remanded the orders of the Department dated September 19, 2002 and March 11, 2003.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed. We have granted review to address a

post-hearing motion made with regard to the retention of hearing audiotapes and because we believe that Ms. Lukic has satisfied her burden of proof with regard to her claim of total permanent disability.

PROCEDURAL MATTERS

Rejection of Exhibits

Ms. Lukic takes issue with our industrial appeals judge's rejection of Exhibit Nos. 4-26. In fact, these exhibits, while marked, were never offered. Under such facts, we are constrained to agree that these exhibits were properly rejected.

Exclusion of Testimony of Richard McCollum, M.D.

Ms. Lukic contends that our industrial appeals judge erred in admitting the testimony of Richard McCollum, M.D., based on the rationale in *Tietjen v. Department of Labor & Indus.*, 13 Wn. App. 86 (1975). We have previously addressed this issue in *In re Elvina Munk*, BIIA Dec., 58,847 (1982). In that matter, we stated:

> While the language in the *Tietjen* case may state a widely held position allowing an attorney's presence during an examination conducted in an adversarial setting, it clearly does not apply to examinations conducted by the Department of Labor and Industries in a setting designed for administrative adjudication. The Department's gathering of information pursuant to its statutorily authorized duties in administering the Workers' Compensation Act is not the type of adversarial proceeding undertaken in an examination pursuant to CR 35 and not the type of situation contemplated by the court in its discussion in the *Tietjen* case.

Munk, at 2. We agree with our industrial appeals judge and allow the testimony of Dr. McCollum.

Retention of Audiotapes of Hearing Conducted on April 24, 2003

This issue arises out of the claimant's issuance of a subpoena to Alliance Reporting on May 12, 2003. The subpoena directed that Alliance Reporting produce any documents, including any tape recordings, made at the hearing held on April 24, 2003. The audiotape in question is an audiotape made by a court reporter who works for Alliance Reporting. The audiotape was made as a backup to the court reporter's printed notes. The contents of this tape are assumed to be any discussion held while on the record, and thus should be accurately reflected by the court reporter's transcribed notes.

On May 16, 2003, the Department filed a motion to quash the subpoena, and on May 19, 2003, Alliance Reporting filed its own motion to quash the claimant's subpoena. On May 21, 2003, Assistant Chief Industrial Appeals Judge Charles McCullough heard the Motion to Quash. In her opposition to the motion to quash, Ms. Lukic identified areas of concern that prompted her to issue

the subpoena to obtain the audiotape. Chief among her reasons were allegations that our industrial appeals judge behaved in a manner inconsistent with impartiality, and that our industrial appeals judge did not permit the provision of adequate translation services. Finally, the claimant pointed out that the industrial appeals judge, at the April 24, 2003 hearing, had asked that this matter be referred to the Washington State Bar Association, and, accordingly, the tape should be preserved for this purpose.

In response to these arguments, our assistant chief industrial appeals judge (hereafter, ACIAJ) first noted that there was no allegation that the hearing was improperly transcribed; we note that no such allegation has been made in the claimant's Petition For Review. Further, he noted that any allegation of impartiality or inappropriate behavior on the part of the hearing judge had been remedied, since that industrial appeals judge had recused herself. We note, too, that a different industrial appeals judge heard all subsequent proceedings. With regard to the provision of interpreter services, our ACIAJ ruled that an approximation of the amount of time spent on (untranslated) procedural matters could be extrapolated by using the listed start and end times in the transcript.

Finally, our ACIAJ clearly stated that this Board has no intention of filing a complaint with the Washington State Bar Association. However, our ACIAJ recognized that other parties may elect to file a complaint with the Washington State Bar Association. In view of that, he ordered that the tape not be destroyed for a period of one year, such that in the event a complaint is filed, or that the Washington State Bar Association, for whatever reason, wishes to obtain the tape, it would be able to do so. Thus, the tape was to be preserved for one year from the date of the ruling, which was May 21, 2003.

Subsequent to this, the hearings proceeded and a Proposed Decision and Order was issued on March 2, 2004. The period of time in which to file a Petition for Review was extended at the request of the Department until May 11, 2004. On April 22, 2004, the claimant filed a motion to extend the prior oral ruling of our ACIAJ to extend the period of time requiring Alliance Reporting to preserve the audiotape of the April 24, 2003 hearing. On May 11, 2004, our Executive Secretary, David Threedy, wrote a letter that stated if no Petition For Review was filed, this Board would lose jurisdiction to further consider this matter, as it would be required by statute to issue an Order Adopting Proposed Decision and Order. Executive Secretary Threedy further stated that should a Petition For Review be filed, the motion would be addressed in a Decision and Order. Alliance Reporting has provided assurances that the audiotape would, in any event, be preserved pending

the outcome of the claimant's motion to extend the time for preservation of the audiotape. Subsequent to this, the claimant filed a Petition for Review, and the issue of preservation of the audiotape is squarely before us.

We wish to state unequivocally that we agree completely with our ACIAJ's oral rulings and we adopt and incorporate them herein by reference. We note that there is no allegation that the transcribed record for that day is inaccurate in any way, which would necessitate reference to the backup tapes. We do not believe any actions of the first industrial appeals judge adversely affected decision of this matter. We note that the first industrial appeals judge recused herself and a different industrial appeals judge was assigned to hear this matter. Further, we believe that our industrial appeals judge provided appropriate translation services, an issue we will address more fully, *infra*.

This issue arose out of a motion to quash the claimant's subpoena, which was issued to obtain the audiotape, and our ACIAJ quashed the subpoena. ACIAJ McCullough ruled, in effect, that since the industrial appeals judge had recused herself, the only remaining reason that the audiotape might be relevant was in the event of the filing of a bar complaint, and thus directed that the audiotape be preserved solely for that purpose. Again, we agree with ACIAJ McCullough.

This Board does not own or possess the audiotapes. Thus, to require a third party – in this case, Alliance Reporting or its court reporter – to take some action, or to prohibit some action, would be the subject of an equitable remedy, such as an injunction. It is axiomatic that this Board has appellate jurisdiction only and lacks equitable jurisdiction, and an injunction is an equitable remedy. *See Washington Federation of State Employees, Council 28, AFL-CIO v. The State of Washington, et al*, 99 Wn.2d 878 (1983). We recognize that it could be argued that an order directing the preservation of the audiotape would sound in equity, and that this Board lacks the jurisdiction to issue such an order.

We are mindful, however, that ACIAJ McCullough premised his decision on the representation that ultimately, one or more of the parties might have intended to file a complaint with the Washington State Bar Association, and he wanted to ensure that if the Bar believed this to be a valid complaint, the Board would not be responsible for allowing evidence to be destroyed.

RCW 51.52.100 provides, in pertinent part:

> Members of the board, its duly authorized industrial appeals judges, and all persons duly commissioned by it for the purpose of taking depositions, shall have power to administer oaths, to preserve and enforce order during such hearings; to issue subpoenas for, and to compel the attendance and testimony of, witnesses, or the production of books, papers, documents, and other evidence, or the taking of depositions before any designated individual competent to administer oaths, and it shall be their duty so to do to examine witnesses; and to do all things conformable to law which may be necessary to enable them, or any of them, effectively to discharge the duties of his or her office.

While the Board may lack broad equitable powers, it nonetheless possesses the authority to enable it to discharge the duties of its office. Where, as here, there is an allegation of improper conduct, the Board has the authority, if not the duty, to require the preservation of an item that is alleged to be relevant; this is, within its authority to properly administer the Industrial Insurance Act.

We wish to make it clear that the Board certainly takes no position with regard to the commission of unprofessional conduct. It is not charged with making such a determination, and makes no assumptions, nor any recommendations here. It simply acts in its capacity as a quasi-judicial body to preserve a document that might be evidence in a Washington State Bar Association proceeding. Accordingly, we order the preservation of the audiotape for a period of sixty days from the date of this Decision and Order. If one or more parties choose to file a complaint with the Washington State Bar Association, then this should be done within that period of time. If a complaint is filed, and if the Washington State Bar Association believes the audiotape to be necessary, and it uses its subpoena powers to obtain the audiotape, then it shall be produced. Otherwise, the tape may be disposed of as seen fit by those possessing it.

Provision of Interpreter Services

Ms. Lukic contends that she is entitled to the provision of an interpreter at all phases of her claim. She asks that this Board direct the Department to provide, at the Department's expense, an interpreter for all aspects of claim administration. Further, she argues she is entitled to an interpreter at Board expense, for all phases of litigation, including preparation time with counsel, depositions, and hearings.

With regard to the contention that this Board should direct the Department to provide, at the Department's expense, an interpreter for all phases of claim administration and for all of her interactions with the Department, we reiterate that this Board has only appellate jurisdiction. The Board lacks the authority to direct the Department in any aspect of initial claim administration. The

Board may review actions of the Department, and in so doing may take into consideration the claimant's ability to understand those actions. If a non-English speaking claimant were provided vocational services in a language she did not understand, then this Board would have the authority to review whether she had been adequately retrained, not whether the matter should be remanded with direction to provide an interpreter. If an interpreter is not provided, then this Board can only pass on whether the claimant was adequately retrained.

With regard to provision of interpreter services at the Board, we note that this issue was the subject of an order dated March 27, 2003, issued by ACIAJ McCullough. Again, we agree with our ACIAJ's ruling and we hereby incorporate it by reference.

Provision of interpreter services at the Board is governed by WAC 296-12-097, which refers to Chapter 2.43 RCW, and must be construed in harmony with that statute. RCW 2.43.040(2) and (3) provide, as follows:

> (2) In all legal proceedings in which the non-English speaking person is a party, or is subpoenaed or summoned by the appointing authority or is otherwise compelled by the appointing authority to appear, including criminal proceedings, grand jury proceedings, coroner's inquests, mental health commitment proceedings, and other legal proceedings initiated by agencies of government, the cost of providing the interpreter shall be borne by the governmental body initiating the legal proceedings.
>
> (3) In other legal proceedings, the cost of providing the interpreter shall be borne by the non-English-speaking person unless such person is indigent according to adopted standards of the body. In such a case, the cost shall be an administrative cost of the governmental body under the authority of which the legal proceeding is conducted.

We do not believe that matters brought under the Industrial Insurance Act are those contemplated in subsection (2) of RCW 2.43.040, as they are not proceedings initiated by an agency of the government. *See In re Maria Gonzalez*, BIIA Dec., 97 0261 (1998). Thus, there is no statutory requirement that the Board of Industrial Insurance Appeals provide, at the Board's expense, an interpreter at Board proceedings. The exception to this rule is contained in RCW 2.43.040(3), which provides that an interpreter is to be provided "at the cost of the governmental body under the authority of which the legal proceeding is conducted" at legal proceedings when a person is determined to be indigent. While this section might arguably require the Board to provide an interpreter at the Board's expense, this Board has promulgated WAC 296-12-097, which provides that an industrial appeals judge may appoint an interpreter, at the Board's expense, to assist a party throughout the proceeding. Thus, we need not address whether Ms. Lukic is indigent, as the

record reflects that a Bosnian interpreter was duly provided to her at the Board's expense at all proceedings.

Ms. Lukic argues, however, that she is entitled to an interpreter at the Board's expense for all phases of litigation, including trial preparation and depositions. She argues that this Board's failure to provide an interpreter at the Board's expense at all phases of litigation deprived her of equal protection of law, and of her right to substantive and procedural due process of law. RCW 2.43.040 authorizes the appointment of an interpreter at "all legal proceedings." RCW 2.43.020(3) defines "legal proceeding" as follows:

> "Legal proceeding" means a proceeding in any court in this state, grand jury hearing, or hearing before an inquiry judge, or before [an] administrative board, commission, agency, or licensing body of the state or any political subdivision thereof.

Clearly, this provision contemplates that a non-English-speaking person be provided an interpreter when he or she is actually in hearing before an industrial appeals judge. We do not believe that this provision contemplates the provision of an interpreter, at the Board's expense, while a party attends a deposition or during preparation for trial. In the case of perpetuation depositions, we note that this is a matter of convenience for a claimant; he or she may ask that a witness simply be subpoenaed to appear before the Board to testify, instead of using a deposition to perpetuate testimony.

Ms. Lukic argues that the Board's failure to provide and pay for an interpreter for trial preparation and other proceedings violates her procedural and substantive due process rights, as well as depriving her of equal protection of law. She has not, however, provided any authority for these propositions. In so stating, we must observe that this is not a criminal matter. Criminal cases cited for the proposition that the Board must provide an interpreter at all phases of proceedings are simply not applicable, as they are rooted in the constitutional protections accorded to criminal defendants.

Finally, Ms. Lukic takes issue with the means by which an interpreter was provided, specifically at the hearing held on April 24, 2003. She contends that the industrial appeals judge should not have limited the interpreter to interpretation of what was said in open court only, and that the industrial appeals judge should have ensured the interpretation of all exchanges done in colloquy.

As we have observed previously, any error that occurred at that hearing has been remedied; a different industrial appeals judge was assigned to hear this matter, and Ms. Lukic was accorded additional time to present her testimony. We believe, nonetheless, that no harmful error occurred at that hearing. First and foremost, the conduct of trials, including the use of interpreters, is committed to the discretion of the trial judge. *See State v. Jairo Gonzales-Morales*, 138 Wn.2d 374 (1999). Accordingly, we review the acts of our industrial appeals judge on an abuse of discretion basis.

At the hearing held on April 24, 2003, our industrial appeals judge directed that the interpreter provide interpretation only while in open court. While it may, under different circumstances, be preferable to permit some degree of interpretation between counsel and claimant, we cannot say that a failure to do so is an abuse of discretion, nor is it harmful error. We recognize that trial situations may differ, and that the orderly submission of evidence may require strict observation of strict rules. Similarly, with regard to the translation of colloquy at that hearing, we note that Ms. Lukic did not even raise this issue until after the colloquy. Again, it may be preferable that everything stated in open court be interpreted, but this is a matter for the sound discretion of our industrial appeals judge. After review of this record, we cannot say that our industrial appeals judge abused her discretion, or that any error occasioned thereby was harmful.

MERITS

Gordana Lukic is a 38-year-old woman who was born in the former Yugoslavia. She graduated from a vocational high school in Yugoslavia with training in the textile industry. She and her husband were fortunate in that when war broke out, they were able to go to Serbia in 1992. While in Serbia, she worked packaging mushrooms between 1995 through 1998. In 1998, Ms. Lukic, her husband, and their two children, came to the United States. In November of 1998, she obtained work packaging items in a bakery. She left this job some six months later to go to the Four Seasons Hotel to work as a maid.

It is undisputed that Ms. Lukic speaks very limited English. Nonetheless, she worked at the Four Seasons as a room maid for approximately nine months, until January 20, 2000. On that date, she was checking under a bed as part of her usual duties, when she suddenly felt a snap in her lower back, as well as her neck, and an electrical surge ran through her back and neck. She reported the incident and was taken to the emergency room, but there was no Bosnian interpreter at the emergency room.

Ms. Lukic has not been able to work since the injury, due to what she describes as constant and unrelenting pain. In addition to this, she has anxiety and depression, which she did not have prior to the injury. She does not think she can now do any job at all.

In support of her contentions, Ms. Lukic presented the testimony of her attending physicians, Launi Treece, Ph.D., and Clarence Braddock, M.D. Unfortunately, their testimony was presented in two parts. When this matter was initially scheduled, the sole issue before the Board was whether the claimant was entitled to time loss compensation for a given period. After the bulk of the claimant's case had been presented, a second appeal arrived at the Board. This was an appeal of the closing order. Thus, the claimant was obliged to recall some of her witnesses. With the arrival of the second appeal, the focus of this matter changed, as did the opinions of Ms. Lukic's witnesses, and the issues included permanent total disability, as well as entitlement to time loss compensation.

Clarence Braddock, M.D., is a physician certified as a specialist in internal medicine. He works at the University of Washington, where he is also an assistant professor. Ms. Lukic was referred to him by the University of Washington Pain Clinic (a program the Department sent her to) for evaluation of swelling of her left upper and lower extremities. Dr. Braddock noted that Ms. Lukic's main problem has always been her low back. Throughout his testimony, he notes that the claimant has limited range of motion and tenderness, which he described as objective findings, but he also made other findings. He stated:

> At the time that I first saw her the main diagnosis was lumbar spine. And my recollection is that she had – she had had an imaging study – probably an MRI as I recall – that did demonstrate a herniated disc.
>
> Subsequent to that, while under my care she began to relate neck pain symptoms, which led to me ordering an MRI of her neck, which also illustrated some disc disease.
>
> After discerning that, I had her see our neurosurgeons to evaluate if they felt there was any need for further work-up or treatment; for instance, surgical treatment, and they indicated that they did not feel that the findings warranted any surgery at that time.

4/9/03 Braddock Dep. at 7-8. Dr. Braddock also stated, when asked as to the cause of Ms. Lukic's pain problems:

> My opinion is that she has, you know, definite, you know, physical injuries – or let me rephrase it. She has definite physical findings and

> radiographic findings that show that she has, you know, a physical reason to have pain in her neck and low back.

4/9/03 Braddock Dep. at 11. Finally, Dr. Braddock stated, when asked about the cause of the pain problems:

> Given the history that she provided to me and the findings to date, I would say that there's a reasonable likelihood that the back findings are related to the injury.

4/9/03 Braddock Dep. at 12.

In that same deposition, Dr. Braddock stated that if Ms. Lukic could undergo additional treatment, such as talk therapy, pharmacotherapy, physical therapy, occupational therapy, massage, and chiropractic care for another six to twelve months, then after that time she would be as good as she is going to get. 4/9/03 Braddock Dep. at 20-21. He did not, at that time, believe that her condition was fixed and stable.

However, about three months later (July 1, 2003), at the time of the second deposition, Dr. Braddock had a different opinion. He stated that he had since reviewed Dr. Ted Becker's report, and that based on reviewing the additional information and his own observation, he did not believe that further treatment would assist Ms. Lukic. Further, he did not believe she would ever return to full functioning or employability. Moreover, he believed that her inability to return to work is permanent as of July 1, 2003. In both depositions, Dr. Braddock was adamant that Ms. Lukic was not malingering.

In addition to this, Launi Treece, Ph.D., testified that she began seeing Ms. Lukic on July 15, 2002, also on referral from a physician at the University of Washington Pain Clinic. Dr. Treece made several diagnoses, the first and most important was major depressive disorder, recurrent, currently moderate; second, panic disorder, without agoraphobia; and third, post-traumatic stress disorder, although she later admitted that Ms. Lukic does not, in fact, have the requisite symptoms for a diagnosis for post-traumatic stress disorder. Like Dr. Braddock, Dr. Treece does not believe that Ms. Lukic is malingering, and noted that Ms. Lukic has been cooperative in all treatment. In Dr. Treece's opinion, the primary treatment needed by Ms. Lukic is medical, so that she can obtain relief from pain. As long as the pain continues, Ms. Lukic will need psychological help coping with that pain.

Dr. Treece's first perpetuation deposition was on April 9, 2003, and her second was on June 27, 2003. During the period between those two dates, she saw Ms. Lukic three or four times, and in her opinion Ms. Lukic's condition had not changed. Dr. Treece stated that the depression is

related to the pain, and that since there is no way to address the pain, the depression will be ongoing. Given the level of depression, Dr. Treece opined that Ms. Lukic could not return to work, and she is incapable of working.

Ted Becker, Ph.D., performed a physical capacity evaluation (hereafter, PCE) at the request of Ms. Lukic's attorney on May 20, 2003.[1] Dr. Becker's evaluation was fairly lengthy, and he believes that he obtained a valid, reliable picture of Ms. Lukic's physical capacities. He testified at length about methods he uses to validate the testing and ensure that a given participant is using maximum effort. He reviewed a document from the University of Washington Pain Management Clinic, in which Ms. Lukic's physical capacities were assessed, and it was almost identical to Dr. Becker's findings some 16 or 17 months later.

In Dr. Becker's opinion, Ms. Lukic has atrophy on her left side, as well as definite weakness on her left side. He bases this, in part, on the fact that her right thigh is 1.5 centimeters larger than her left thigh. He believes that his examination revealed objective findings of limitation consistent with an ability to perform only light work, and this with limitations on reaching and lifting. Because his testing and the University of Washington's testing were so similar, he believes that these limitations are permanent, and he knows of no job Ms. Lukic could perform that would not require other skills.

Kathryn Reid is a vocational rehabilitation counselor who met with Ms. Lukic at the request of Ms. Lukic's attorney. Ms. Reid reviewed medical records and performed limited testing on Ms. Lukic. Based on this, it is Ms. Reid's opinion that Ms. Lukic is not capable of reasonably continuous gainful employment, nor is she a good candidate for retraining. First, she noted that Ms. Lukic is limited to light work, and that there are additional restrictions on Ms. Lukic using her arms. Further, Ms. Lukic's depression would prevent her from learning the requisite skills for employment. In addition to this, her depression is disabling. Moreover, Ms. Lukic speaks no English and has very limited intellectual capabilities. For instance, her math is at a third grade level, and her reading is the equivalent of the first grade level. Most limiting, however, is the fact that Ms. Lukic cannot speak English. In Ms. Reid's opinion, this fact alone prevents Ms. Lukic from learning the skills necessary to compete in the job market.

[1] It should be noted that all these professionals, Dr. Becker, Dr. Treece, Kathryn Reid VRC, and Dr. Braddock, had a Bosnian interpreter present every time they saw the claimant.

The sole witness called on behalf of the Department was Robert McCollum, M.D. Dr. McCollum is a physician certified as a specialist in orthopedic surgery. He examined the claimant at the behest of the Department on June 17, 2003 [*sic*].[2]

Dr. McCollum also had an interpreter present for Ms. Lukic at the time of the examination. He stated that on examination, the claimant had tenderness to "featherlike touch," and that her straight leg raising tests were inconsistent between sitting and supine positions. He found no spasm or atrophy, but much pain behavior and inconsistent weakness in all four limbs. In his opinion, Ms. Lukic's condition is fixed and stable; she has no permanent partial disability in either her neck or low back and there is no reason she cannot work. Dr. McCollum did not, however, think Ms. Lukic was malingering.

Our industrial appeals judge determined that Ms. Lukic was in need of further treatment, and remanded this matter. Certainly, there is evidence in the record to support that determination, that being in the first deposition of Dr. Braddock. However, Dr. Braddock had changed his opinion by the time of the second deposition, and he believed that Ms. Lukic was permanently totally disabled. He changed his opinion after reviewing the depositions of Dr. Becker, Dr. Treece, and having seen Ms. Lukic two or three times between his first deposition and his second deposition. He, too, is struck by the claimant's limb asymmetry, as noted by Dr. Becker. Thus, Dr. Braddock, the attending physician and associate chairman of the University of Washington Department of Medicine, as well as Dr. Treece, Kathryn Reid, and Ted Becker, testified unequivocally that the claimant's condition is fixed and stable, and that she is permanently totally disabled. Dr. Braddock provided evidence of objective findings to support this opinion, as well.

In contrast, the Department presented **one** witness, Dr. McCollum. He saw the claimant for 25 minutes. He never addressed the findings on MRI; it is not clear from this record that he ever even saw it. He did not address Ms. Lukic's limb asymmetry or Dr. Becker's findings. Finally, he never addressed the issue of depression and what effect that might have with regard to employability. His testimony is so sparse that we cannot find that the Department has overcome the claimant's prima facie case. In view of this, we determine that as of the date of claim closure, the claimant was permanently totally disabled, proximately caused by the industrial injury of January 20, 2000.

[2] It would appear, based on other information in the record, that it was actually January of 2003. This is an error in the transcript of the deposition.

Entitlement to Time Loss Compensation Benefits

Ms. Lukic contends that she is entitled to time loss compensation benefits from January 26, 2002 through the date of claim closure, March 11, 2003. Because we have determined she is permanently totally disabled as of March 11, 2003, it flows from this that she is entitled to time loss compensation between January 26, 2002 through the date of claim closure, which in this case would be March 10, 2003, as she was determined to be permanently totally disabled as of the actual date of claim closure, March 11, 2003.

Entitlement to Benefits Pursuant *to Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801 (2001)

Ms. Lukic also argues that she is entitled to include the value of numerous employer-provided benefits in her wage rate computation. Much of her Petition For Review concerns the various types of benefits, as well as the admissibility of testimony of two of her witnesses. We agree with our industrial appeals judge that much of the testimony of Kate Moriarty and the entirety of that of Robert Moss must be stricken from the record as not relevant because this Board cannot reach the issue of wage rate on jurisdictional grounds.

In reviewing the jurisdictional facts, it would appear that the Department issued an **interlocutory** order on February 3, 2000, in which, among other things, the Department established the wage rate. On March 5, 2001, Ms. Lukic, through her attorney at that time, filed a Protest and Request for Reconsideration, protesting all wage and time loss compensation orders in light of *Cockle*. Because the February 3, 2000 order was interlocutory, the protest was valid, and the Department reconsidered its wage rate order. On March 15, 2001, the Department issued an order in which it determined that the claimant's wages were $1,351.65 per month, if the employer discontinued health care benefits. This was based on wages of $9.65 per hour, eight hours a day, five days a week, plus $109.36 in health care benefits, and the fact that the claimant was married with two dependent children. Certainly, these figures are supported in the record.

This March 15, 2001 order was allowed to become final, as the jurisdictional facts show no further protests filed on behalf of the claimant until September 4, 2001, when Ms. Lukic filed a protest from an order denying time loss compensation. Thereafter, Ms. Lukic raised the issue of her time loss rate at the first conference held in connection with her appeal of the September 19, 2002 order. The issue of jurisdiction, however, was not raised until Industrial Appeals Judge Gebhardt's conference on August 20, 2003, at which time she stated on the record:

> The third issue is upon reviewing the facts upon which this Board has jurisdiction, I noticed a problem with the jurisdiction in what we call

> the Cockle issue. At this point I've expressed my concerns and the parties and I have looked at the Jurisdictional Facts as stipulated to. They have until September 29th to demonstrate that jurisdiction or make argument for that and provide what other information they need in order to establish this Court having jurisdiction on that issue.

8/20/03 Tr. at 12.

Because neither party submitted any argument or legal authority, and there is no evidence in this record to support the Board's jurisdiction over the March 15, 2001 order, our industrial appeals judge deemed the issue waived.

In her Petition For Review, Ms. Lukic argues only that orders based on incorrect calculations are void *ab initio*, which would apparently excuse her failure to appeal them. This, however, is untenable under the rationale contained in *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994). Moreover, we have heretofore addressed the finality of such wage rate orders in *In re Rosalie Hyatt*, BIIA Dec., 02 13243 (2003). We agree with our industrial appeals judge. Not only did Ms. Lukic fail to comply with our industrial appeals judge's directive relative to this issue, there is no basis for this Board's jurisdiction to address this issue, and we thus decline to do so.

CONCLUSION

After careful review of this record, as well as the arguments of counsel, we reverse the Department orders of September 19, 2002 and March 11, 2003, and remand this matter to the Department with direction to determine the claimant to be permanently totally disabled effective March 11, 2003, and to pay time loss compensation benefits for the period January 26, 2002 through March 10, 2003, and for other benefits as may be authorized by law. Further, we direct Alliance Reporting to retain the audiotape of the hearing held on April 24, 2003, for a period of sixty days after the date of this Decision and Order.

FINDINGS OF FACT

1. On January 28, 2000, the Department of Labor and Industries received an application for benefits filed on behalf of the claimant, Gordana Lukic, alleging that an industrial injury occurred on January 20, 2000, during the course of her employment with Four Seasons-Olympic Hotel (Urban Four Seasons Hotel). The claim was subsequently allowed and benefits were paid to the claimant.

   On February 3, 2000, the Department issued an interlocutory order in which it terminated time loss compensation effective January 26, 2000, as the claimant had returned to work, but the claim remained open and the claimant's time loss rate was calculated as $1,171.90 per month,

based on the claimant's status as married with two dependents, and wages of $1,698.40 per month.

On March 5, 2001, the claimant filed a Protest and Request for Reconsideration of any and all wage rate or time loss compensation orders, asking that the Department review the time loss compensation rate in light of *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801 (2001).

On March 15, 2001, the Department issued an order in which it calculated the claimant's time loss compensation rate as $1,269.89 per month, if the employer continued to provide health care benefits, and calculated the time loss compensation rate as $1,351.65 per month, if the employer ceased to provide health care benefits. The time loss compensation rate included all cost of living increases since the date of injury. In the order, the Department further stated that the wages were based on $9.65 per hour, eight hours a day, five days per week, equaling $1,698.40 per month, plus $109.36 in health care benefits, and with the claimant's status as married with two dependents. No protest or appeal was filed with regard to the order of March 15, 2001.

On September 19, 2002, the Department of Labor and Industries issued an order in which it affirmed the provisions of its order of August 30, 2002, wherein it denied time loss compensation for the period of January 26, 2002 through August 29, 2002. On September 26, 2002, the Board of Industrial Insurance Appeals received a Notice of Appeal of the order dated September 19, 2002, filed on behalf of the claimant. On November 13, 2002, the Board issued an order granting the appeal, assigning it Docket No. 02 20031, and directing that further proceedings be held on the issues raised in the Notice of Appeal.

On March 11, 2003, the Department issued an order in which it closed the claim with time loss compensation as paid through January 25, 2002, and without an award for permanent partial disability. On March 17, 2003, the Board received a Notice of Appeal of the order dated March 11, 2003, filed on behalf of the claimant. On April 2, 2003, the Board issued an order granting the appeal, assigning it Docket No. 03 12722, and directing that proceedings be held on the issues raised in the Notice of Appeal.

2. On January 20, 2000, Gordana Lukic was bending over to look under a bed during the course of her employment with Four Seasons-Olympic Hotel (Urban Four Seasons Hotel) and felt immediate pain in her lower back. As a proximate result of this injury, Ms. Lukic developed low back pain, manifested by a herniated disc (as shown on magnetic resonance imaging), as well as a major depressive disorder.

3. Gordana Lukic's low back condition and major depressive disorder were proximately caused by the January 20, 2000 industrial injury.

4. As of March 11, 2003, Gordana Lukic's industrially related conditions, proximately caused by the January 20, 2000 industrial injury, were medically fixed and had reached maximum medical improvement.

5. As of March 11, 2003, Gordana Lukic was a 37-year-old woman who was born in the former Yugoslavia. She came to the United States in 1998. Her education consists of a Yugoslavian high school degree as well as some vocational training in textiles. Her work history consists of work as a packager and work as a maid in hotels. She has a limited intellectual capacity, and can read only at a first grade level. Her math skills are consistent with a third grade level.

6. Ms. Lukic cannot effectively speak or understand the English language, which, together with her limited intellectual capability, precludes her retraining for lighter work.

7. For the period of January 26, 2002 through March 10, 2003, inclusive, the residual effects of the industrial injury precluded Gordana Lukic from obtaining or performing reasonably continuous, gainful employment in the competitive labor market, when considered in conjunction with her age, lack of English, intellectual capability, education, training, work history, and transferable skills.

8. As of March 11, 2003, Gordana Lukic was not capable of reasonably continuous gainful employment in the competitive labor market, when considered in conjunction with her age, lack of English, intellectual capability, education, training, work history, and transferable skills, proximately caused by the residual effects of the industrial injury of January 20, 2000.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of these appeals.

2. The order issued on March 15, 2001, in which the Department established the basis for the claimant's time loss compensation rate, became final and was binding with regard to her time loss compensation rate. The rationale in the decision of *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801 (2001) cannot be applied in this claim to recalculate the claimant's benefit rate.

3. As of March 11, 2003, Gordana Lukic's conditions, proximately caused by the January 20, 2000 industrial injury, were not in need of further necessary and proper medical treatment, as contemplated by RCW 51.36.010.

4. Between January 26, 2002 and March 10, 2003, inclusive, Gordana Lukic was a temporarily totally disabled worker, within the meaning of RCW 51.32.090, proximately caused by the industrial injury of January 20, 2000.

5. As of March 11, 2003, Gordana Lukic was a permanently totally disabled worker within the meaning of RCW 51.32.060, proximately caused by the industrial injury of January 20, 2000.

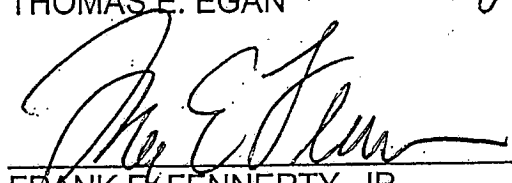
6. The orders of the Department of Labor and Industries dated September 19, 2002 and March 11, 2003, are incorrect and are reversed. This claim is remanded to the Department with direction to issue an order paying time loss compensation for the period January 26, 2002 through March 10, 2003, inclusive; determine the claimant to be permanently totally disabled effective March 11, 2003; and to pay benefits consistent with this determination.

It is so **ORDERED.**

Dated this 17th day of August, 2004.

BOARD OF INDUSTRIAL INSURANCE APPEALS

THOMAS E. EGAN Chairperson



FRANK E. FENNERTY, JR. Member

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

GORDANA LUKIC, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	NO. 04-2-24216-9 SEA FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT **Clerk's Action Required**

JUDGMENT SUMMARY (RCW 4.64.030)

1. Judgment Creditor:	State of Washington Department of Labor and Industries
2. Judgment Debtor:	Gordana Lukic
3. Principal Amount of Judgment:	- 0 -
4. Interest to Date of Judgment:	- 0 -
5. Statutory Attorney Fees:	$200.00
6. Costs:	$0
7. Other Recovery Amounts:	$0

8. Principal Judgment Amount shall bear interest at 0% per annum.

9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum.

10. Attorney for Judgment Creditor: Charlotte Ennis Clark-Mahoney
Office of the Attorney General
900 fourth Avenue
Seattle, WA 98164

ORIGINAL

ATTORNEY GENERAL OF WASHINGTON
LABOR & INDUSTRIES DIVISION
900 Fourth Avenue, Suite 2000
Seattle, WA 98164-1012
(206) 464-7740

11. Attorney for Judgment Debtor: Ann Pearl Owen
Attorney at Law
2407 14th Avenue South
Seattle, WA 98144

This matter came on regularly before the Honorable William Downing, in open court on September 16, 2005. The Plaintiff, Gordana Lukic, was represented by counsel, Ann Pearl Owen; the Defendant, Department of Labor and Industries (Department), appeared by its counsel, Rob McKenna, Attorney General, per Charlotte Ennis Clark-Mahoney, Assistant. The Court reviewed the records and files herein, including the Certified Appeal Board Record, and briefs submitted by counsel, and heard argument of Counsel. Therefore, being fully informed, the Court makes the following:

I. FINDINGS OF FACT

1.1 Hearings were held at the Board of Industrial Insurance Appeals (Board) and testimony of other witnesses was perpetuated by deposition.

The Industrial Appeals Judge issued an initial Proposed Decision and Order on March 2, 2004 from which Plaintiff filed a timely Petition for Review. The Board considered Plaintiff's Petition for Review, granted review, and issued its Decision and order on August 17, 2004.

Plaintiff thereupon timely appealed the Board's Decision and Order to this Court.

1.2 A preponderance of evidence supports the Board's Findings of Fact Nos. 1 through 8. The Court adopts as its Findings of Fact, and incorporates by this reference the Board's Findings of Facts Nos. 1 through 8 of the August 17, 2004 Decision and Order.

Based upon the foregoing Findings of Fact, the Court now makes the following

II. CONCLUSIONS OF LAW

2.1 This Court has jurisdiction over the parties to, and the subject matter of, this appeal.

2.2 The Board's Conclusions of Law Nos. 1 through 6 are correct. The Court adopts as its Conclusions of Law, and incorporates by this reference, the Board's Conclusions of Law Nos. 1 through 6 of August 17, 2004 Decision and Order.

2.3 The Board's Decision and Order of August 17, 2004 is correct and is affirmed.

Based on the foregoing Findings of Fact and Conclusions of Law the Court enters judgment as follows:

III. JUDGMENT

3.1 The August 17, 2004 Board of Industrial Insurance Appeals Decision and Order, should be and the same is hereby affirmed.

3.2 The Defendant is awarded, and the Plaintiff is ordered to pay, a statutory attorney fee of $200.00.

3.3 The Department is awarded interest from the date of entry of this judgment as provided by RCW 4.56.110.

DATED this 21 day of ~~October~~ Nov., 2005.

William L. Downing, J U D G E

Presented by:
ROB MCKENNA
Attorney General

CHARLOTTE ENNIS CLARK-MAHONEY
Assistant Attorney General
WSBA No. 13096

Copy received,
approved as to form and
notice of presentation waived:

ANN PEARL OWEN
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Appendix D

Management Update

Management Update

Insurance Services: Claims Administration and Self-Insurance

Effective Date
08/13/2007
REVISED 08/17/07

Topic
Interpreter and Translation Services To Workers

Issuing Authority
Sandy Dziedzic
Cheri Ward
Jean Vanek

Interpreter and Translation Services to Workers

The department or self-insured employer (SIE) (including the SIE third party administrator) will provide an interpreter to communicate with an unrepresented worker who has limited English-speaking proficiency or similarly limiting sensory impairment.

NOTE: Where a worker with limited English proficiency is represented by an attorney, the department or SIE may communicate through the attorney in English. It is the responsibility of the attorney representative to communicate with his or her client worker. If the represented worker with limited English proficiency contacts the department or SIE by phone or in person without counsel, an interpreter is authorized for the oral communications. The department or SIE is not required to provide interpreters for communications in relation to any proceedings at the BIIA or Court.

When the worker requests interpreter services, the department or SIE may verify whether the worker needs assistance in translation. Workers can report limited English proficiency status on the Report of Accident, SIF2 form, or by notifying the department or SIE by phone or letter.

Limited English proficiency is defined as limited ability or inability to speak, read, or write English well enough to understand and communicate effectively. This includes most people whose primary language is not English. Services should also be provided to workers similarly impacted by hearing, sight, or speech limitations.

Interpreters are authorized when a limited English proficiency worker needs to communicate with the department or SIE, attend medical and vocational appointments, and at independent medical examinations (IME). Authorized interpreters must be provided by the department or SIE for IMEs.

Interpreter services also include written translation of necessary correspondence to and from the unrepresented limited English proficiency worker. Copies of both the original and translated versions of the document should be maintained in the claim file.

Resources

AT&T Language Line Instructions
http://ohr.inside.lni.wa.gov/webhome/resource_docs/InterpreterService.htm

Online Reference System (OLRS)
http://olrs.apps-inside.lni.wa.gov/

Claims Training Bulletin: Translation Process
Management Memo: Spanish Translations
Training Handout: Services for the Hearing & Speech Impaired
WAC 296-20-2025

Contact Claims Training if you have any questions.

NOTE: This is an interim policy change. This issue has been referred to the policy committee to be included in upcoming revisions.

NO. 81478-3

SUPREME COURT OF THE STATE OF WASHINGTON

HAJRUDIN KUSTURA, GORDANA LUKIĆ, AND MAIDA MEMIŠEVIĆ,

Petitioners,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that she caused copies of the **Department's Answer to Petition for Review** with attached **Appendices** and this **Certificate of Service** to be served and delivered to the parties of record as follows:

BY ABC LEGAL SERVICES:
(this party did not agree to service by e-mail).

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BY US MAIL:
(this party did not agree to service by e-mail).

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